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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 342

STEVE ANDERSON, EARL TROMBLEY, LILLIAN SOCIA, ALBERT WATKINS, ARTHUR SIBBE, NELSON LUCHTMAN, RITA SCHULTE, individually, for and in behalf of themselves and others similarly situated; and LOCAL No. 1083, UNITED POTTERY WORKERS OF AMERICA, affiliated with the Congress of Industrial Organizations, Mt. Clemens, Michigan,

Petitioners,

vs.

MT. CLEMENS POTTERY COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT

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Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT

A. OPINIONS BELOW

The original opinion of the District Court (R. 239-248) is reported in 60 F. Supp. 146. The District Court's findings of fact and conclusions of law (R. 272-274) and a supplemental opinion by the District Court (R. 287-292)

do not appear to have been officially reported. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 149 F. (2d) 461.

B. JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered May 21, 1945 (R. 1587). Certiorari was granted by this Court October 15, 1945. Petitioners aver that they invoke the jurisdiction of this Court "under the provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1063, 29 U.S.C. Sec. 207 (a)" (Petition for Certiorari, p. 2); but it would seem that this statute has no bearing on this Court's jurisdiction in the premises.

C. GENERAL STATEMENT OF THE CASE

It has been necessary for counsel for respondent to write this brief before receiving a copy of petitioners' brief. Being on notice that the case was on call in this Court for the week of January 7, 1946, counsel for respondent sent their brief to the printer on December 31, 1945 (so that the brief could be printed and filed with the Court in due time), although at the last mentioned date no copy of petitioners' brief had been received. On January 3, a copy of petitioners' brief was received. It being too late to have the principal portion of our brief re-set and re-printed, we have appended at the end of this brief a separate reply to petitioners' brief.

The fundamental issue presented to the lower courts in this case, which is an employee suit for liquidated

damages under the Fair Labor Standards Act (Act of June 25, 1938, Public No. 718, 75th Congress, 52 Stat. 1060, 29 U.S.C.A. Secs. 201-219), was whether or not the petitioners (employees of respondent company) proved that in the course of their employment at respondent's pottery plant they did in fact (as was alleged in their behalf) customarily start work before the regular starting time. Their claim was that while the employer figured their hours of work from the regular starting time, they in fact started work ahead of the regular starting time, and had worked longer hours than the employer's records showed.

The Special Master before whom the case was heard found the facts to be as follows: (1) The petitioners, in accordance with the universally prevailing practice in industrial plants, normally entered the plant and punched the time clocks a few minutes before starting time, but this was immaterial because in instances where an employee arrived before starting time at that portion of the factory where his work was done, he waited for his fellow employees to arrive before starting work, and was free to spend such waiting time on his own behalf; and in fact in instances where an employee did so arrive before starting time he did spend the interval in conversation with fellow workers or similar activities; and under the particular facts of the case, such waiting time, where it occurred, was not working time (R. 199, 183, 185), and was not claimed by petitioners' expert witness to be working time (R. 1459, 1460); (2) there was no proof from which there could be computed with any degree of reliability either (a) the amount of time taken up by certain preliminary activities (such as putting on overalls and gloves, opening windows, turning on light switches, etc.) nor (b) the proportion of time so spent in advance

of the starting time, if any (R. 201, 169, 174, 201, 217); (3) actual productive work did not begin before the regular starting time (R. 191) and not infrequently began substantially after the regular starting time (R. 184, 191); (4) employees frequently quit work in advance of quitting time, and proceeded to wash up and wait for quitting time to punch out at the time clock (R. 179, 182); (5) generally, any finding as to the alleged amount of work, if any, done outside the regularly scheduled hours would be purely speculative and conjectural (R. 201). Accordingly, the Special Master recommended that the claims be dismissed (R. 214).

Exceptions were filed with the District Court. After hearing oral arguments, that Court accepted all of the Master's findings except his determination that actual production work did not begin before starting time. The District Court concluded that *some* employees (R. 272) did sometimes start actual production work early, and on the basis of the formula hereafter set forth (which was however made applicable to *all* employees in the case) the District Court entered a judgment against respondent for $2,415.74, plus costs (R. 297, 305). But as to all other points, the District Court ratified and approved the Master's findings. The District Court in fact specifically affirmed the Master's finding of fact that work did not begin the moment an employee punched the time clock (R. 244). The District Court further confirmed the Master's factual finding (R. 199) that time spent walking through the plant to the place of work was not, under the particular circumstances here involved, to be counted as working time (R. 241-243; this is pointed out in the petition for certiorari, pp. 7, 9).

The District Court's opinion made it clear that in the opinion of that Court, and under the facts presented in

this record, the respondent did not violate the law by failing to count as hours worked the time spent by the employees getting ready to start work (R. 241-244, inc. and R. 396, 397, 1494, 1499). The judgment which the District Court awarded petitioners was based on that Court's conclusion that actual production work started before starting time. Petitioners' major claim (that all time spent in the factory after entering and punching the time clock must be counted as hours of work) was denied.

The petitioners did not appeal from this finding and determination, nor did they file any cross appeal from the decision of the District Court. Accordingly, the Circuit Court of Appeals did not face the question which petitioners now seek to raise here as to whether the time which an employee spends after punching the time clock in walking to his place of work and waiting for other employees to arrive so that work may commence, must be counted as time worked.

The question remained, of course, when the employees did start work. As above noted, the District Court disagreed with the finding of the Master that work started at the scheduled starting time. The District Court, in rejecting this finding, held that it could be assumed that each employee who punched in early (the formula was not applied to those who punched in late) started work seven minutes after punching the time clock at the beginning of the day, and five minutes after punching the time clock at the resumption of work after the lunch period. On the basis of this formula, the District Court entered a judgment awarding petitioners approximately a penny a day additional wage payments.

The respondent appealed from this judgment to the Circuit Court of Appeals. That Court found the District Court to be in error in that it had overruled a factual

finding of the Special Master which was abundantly supported by substantial evidence and which was not in any respect shown to be "clearly erroneous" and which was therefore binding on the District Court under the plain requirement of Rule 53 (e) (2) of the Federal Rules of Civil Procedure (28 U.S.C.A. following Sec. 723 (c)). The Circuit Court of Appeals further ruled that the arbitrary formula applied by the District Court produced a judgment based on surmise and speculation, and was hence invalid. Accordingly, the Circuit Court of Appeals ordered the complaint dismissed.

The petition for certiorari suggested that petitioners were entitled to have treated as hours of work all hours and minutes elapsing from the moment an employee punches the time clock on entering the plant in the morning until the moment he again punches the time clock on leaving the plant. But this question is not properly before the Court; for the ruling of the District Court was adverse to petitioners on this point; and petitioners did not in any way appeal this adverse judgment to the Circuit Court of Appeals nor otherwise save the question; it is too late to raise the issue now. The only question which can be here presented, it would appear, is whether the Circuit Court of Appeals was correct in vacating the judgment of the District Court; or whether, on the other hand, the judgment of the District Court should be reinstated.

D. QUESTIONS INVOLVED

Thus, as the case comes to this Court, it presents very narrow issues.

1. The first is whether or not the Circuit Court of Appeals correctly determined that "there was abundant

substantial evidence to support the findings of the special master and it could not appropriately be said that such findings are clearly erroneous" (R. 1595, 149 F. (2d) 461, 465). Under the findings of fact by the Master, there can be no question but that petitioners' cause must be dismissed. As the District Court said, the Master found that the claims of plaintiffs (petitioners herein) as to starting work early were not true (R. 241). Therefore, unless upon a review of all the evidence it should be concluded that the Master's findings are clearly erroneous *and not supported by* substantial evidence, there can be no further question presented. Unless the Master's findings can be so characterized, they are binding on the Court. Rule 53 (e) (2), Federal Rules of Civil Procedure.

2. If on a review of all the evidence it should be concluded that the Master's findings were clearly erroneous and therefore not binding upon the District Court, a second question would arise as to whether or not the formula adopted by the District Court produced a judgment based upon surmise, speculation and conjecture, and hence invalid. The Circuit Court of Appeals so held.

3. If the judgment of the Circuit Court of Appeals should be held to be in error on both of the foregoing points, then the question would arise as to whether the dismissal of the claims was justified on the basis (urged by respondent below) that there should be off-set against the claims of petitioners, as allowed by the District Court, the amounts of extra compensation which had been voluntarily paid them by respondent during the period involved.

E. STATEMENT OF FACTS

I. Outline of Proceedings in Lower Courts

1. THE PARTIES

This action was filed in April, 1941, by Local 1083, United Pottery Workers of America, C.I.O., and seven members of said Union, asserting various violations of the Fair Labor Standards Act (52 Stat. 1060; 29 U.S.C.A. Sec. 201-219) on the part of the Mt. Clemens Pottery Company. The complaint contained the usual recital that the action was brought on behalf of all similarly situated employees. Identification of these represented parties was accomplished (under an order of the District Court, R. 29), by the filing of individual designations. Approximately 280 employees or former employees signed such designations, and under the ruling above referred to were admitted as additional parties plaintiff (petitioners herein).

The defendant (respondent herein) is a Michigan corporation with its office and place of business at Mt. Clemens, Michigan, where it operates a plant (the largest single unit Pottery plant in the United States, R. 1108), employing approximately 1000 to 1200 persons during the period involved herein (R. 382), devoted to the manufacture of dinnerware—plates, cups, saucers, etc. It has been in business for about thirty years (R. 1086). Substantially all of its employees (exclusive of office help and maintenance workers) are paid on incentive or piece rates above a guaranteed hourly wage, so that their compensation normally depends on the number of pieces which they process during the course of a day.

2. THE PLEADINGS AND THE ISSUES

The complaint, filed April 16, 1941, charged principally that the time clock cards of the respondent company were so rigged or "doctored" that the figures punched on the cards did not correctly reflect the actual time at which the card was punched. Paragraph 7 of the complaint charged, in part, that the respondent deliberately falsified the records of the time worked by its employees; that the employees worked fourteen minutes in advance of the time shown on the time clocks in the morning of each working day; that the time clocks maintained by the Company indicated that employees stopped work for lunch at 11:45 A.M., whereas, in fact, each employee was required to continue working until 11:55 A.M. etc. (R. 10). This charge was later specifically abandoned (R. 386; Tr. of Dec. 15, 1941, p. 24).

The complaint further charged (par. 4 and 5, R. 8) that the Company worked its employees forty-five hours a week from October 24, 1938 until the time of the filing of the action. This claim likewise was superseded and no evidence in support of any such claim was offered. The complaint also charged (par. 6, R. 9) that certain employees performed homework without compensation. It may be noted that the only reference to homework in the testimony was the volunteered statement of one of petitioners' witnesses that she was not permitted to do decalcomania work at home (R. 145, 871). This charge was later stricken from the complaint (R. 56).

The complaint was drafted in vague and general terms, and failed to specify with any precision what claims were made on behalf of particular employees, or what employees were claimed to be represented. The respondent

company accordingly filed a motion (R. 17) seeking to limit the scope of the action to the named plaintiffs (petitioners here), and seeking to strike certain allegations in the complaint, and seeking a bill of particulars. On June 13, 1941 the Court entered an order (R. 29) requiring the filing of written designations by all employees wishing to be represented in the action and requiring petitioners to file a bill of particulars.

In October, 1941, petitioners filed a bill of particulars, so-called (R. 42), which did not give any substantial additional information. It alleged that all of the employees listed in the designations filed up to that time claimed overtime compensation; but there was no allegation as to how much overtime was claimed.

The Company thereupon filed a motion for further particulars (R. 48), and on November 10, 1941 the District Court entered an order (R. 56) requiring the furnishing of some but not all of the further particulars which had been sought. Pursuant to this order there was filed on or about November 27 an amendment to the bill of particulars so-called (R. 59) which charged that what the petitioners complained of was the practice of the Company of crediting employees with working time only from the succeeding quarter hour when an employee checked in and to the preceding quarter hour when the employee checked out. It charged that under this practice the Company "has deducted from the time worked, as shown on said time cards, a period of as much as 56 minutes each day" (R. 60).

Thus originated the claim that employees had worked fifty-six minutes a day beyond the time shown on the Company's records. This claim was repeated endlessly throughout the course of hearings thereafter, but no proofs in support of any such claim were ever offered.

This amended bill of particulars also raised a number of new charges, many of which were later dropped.

The filing in November, 1941, of the amendment to the bill of particulars, containing numerous charges which were never pressed, coincided with the calling of a second organizational strike at the Pottery plant (R. 1299). Within a week after the filing of this so-called amendment to the bill of particulars there was served a motion for judgment by default (R. 74) which was denied without argument (R. 381). In January, 1942, petitioners filed another motion for judgment based on the theory that they were entitled to a summary judgment because of the statement in the answer filed by respondent that employees were not paid for periods when they were in the plant but not working prior to the start of work or subsequent to the close of work (R. 117). It was in this motion—filed after the suit had been pending some nine months—that petitioners first adopted the theory that their hours of work included all the time which they spent on the employer's premises. This motion likewise was denied (R. 137, 139), the Court pointing out that employees cannot start work the minute they punch the time clock (R. 396, 397).

Thereupon the cause was referred to Donald L. Quaife, Esq., as Special Master (R. 140).

The case presents the rather unique situation that most of the claims alleged in the complaint, and many of the claims brought into the case through the bills of particulars, were abandoned.

On the trial, the issues were reduced to four claims, quite different from those set forth in the complaint and the bills of particulars. As enumerated by the District Court (with the acquiescence of counsel for petitioners)

at the hearing of December 15, 1941, a few weeks prior to the opening of the trial before the Special Master, the claims on which the petitioners were to go to trial were as follows: first, that employees were getting paid for less time than the time clocks showed they were entitled to; second, that some of the cards did not show the exact number of hours worked, that more hours were worked than shown on the cards; third, that money had been paid to a fictitious third person and that the employees had, as a result, worked on uncompensated labor (R. 391). Subsequently and during the course of the hearings before the Master there was added a claim for wage deductions. As stated during the trial, there were four claims: (1) Fifty-six minutes per day extra time worked, as shown by the time clocks, which was not computed by the Company as hours worked; (2) charity work; (3) payment of the so-called "invisible man;" (4) unauthorized deductions for equipment that the employees had to buy from the employer (R. 562).

It is significant that both the Special Master and the District Court held against petitioners on each of these claims. After the proofs were introduced, the only issue left in the case was whether any of the petitioners started work at some point of time after punching the time clock but before the regular starting time.[1]

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[1] The record clearly discloses, we submit, that neither the claims made in the pleadings nor the claims on which petitioners finally went to trial, were made in good faith. The record, further, abundantly reveals that during a course of proceedings that lasted over three years in the District Court, counsel for petitioners sought persistently to impress these claims on the District Court, in the apparent hope of persuading that Court that petitioners, as was repeatedly asserted, had been "gypped." The petitioners claimed that appellant was the only Company in the world which computed hours of work in the way of which petitioners complained (R. 388). It

While it would seem clear that the issues framed on the proofs by the District Court's decision and the Company's appeal therefrom to the Circuit Court of Appeals (there having been no cross-appeal on behalf of the employees) finally crystallized the questions to be ultimately considered, yet the petition for certiorari seems to suggest that there should be re-opened in this Court questions which had been decided against petitioners below, and which they had not appealed. This, we think, cannot be done.

On the proofs submitted, and the proceedings had in this case in the lower courts, the only substantial issue presented on the merits of petitioners' claim is whether or not petitioners, or any of them, started work a few minutes before the regular starting time, on occasions where an employee entered the plant before the time for starting work and where there was no absolute physical impediment to his starting work a few minutes before the regular starting time. (In some cases, as hereinafter discussed, it was physically impossible to start work early). The employer in computing the employees' hours of work made the calculation on the basis that employees started work at the regular starting time; but it was claimed on

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was shown, however, and not contradicted, that substantially all companies use the same method, i.e., figuring hours of work from starting time to quitting time, disregarding the fact that employees enter the factory a few minutes before starting time and leave a few minutes after quitting time (R. 170). Incidentally, the propriety of this method is recognized by the Wage and Hour Division of the U. S. Department of Labor, Exhibit 113 (R. 1471, reproduced at R. 1580). The claims of mistreatment had no connection at all with the facts. For example, it was claimed that the Company required common laborers to pay for the cost of carriages used in pushing ware about the plant (R. 383). These carriages cost $50 to $500 (R. 1149). It was uncontradicted that the employees did not pay for

behalf of the employees that they sometimes started work a few minutes before starting time, and had therefore in fact worked a little longer than was indicated by the Company's records. Such increment would in some cases carry an employee's total hours for a week into the brackets (over forty-four hours from October 24, 1938 through October 23, 1939; over forty-two hours from October 24, 1939 through October 23, 1940; and over forty hours subsequent to October 24, 1940) where the Fair Labor Standards Act (52 Stat. 1060, 29 U.S.C.A. Sec. 201-219) requires payment of overtime compensation equal to at least once and one-half the employee's regular rate of pay. It was conceded that even if the employees did prove that they had worked a few minutes longer than the Company's records showed, they had nevertheless been compensated for such extra time at their regular straight time rates (because of the piece rate nature of their compensation) but it was claimed that additional half time should be paid for any such additional minutes of work that might be proved, if such extra minutes carried the total hours beyond the point at which the statute requires payment at once and one-half the regular rate.

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them (R. 1149). The record shows that on or about December 6, 1941, an action was filed by counsel for petitioners herein in the Court of Common Pleas of Lucas County, Ohio, in the name of twelve employees of the Pottery Company, making similar charges of violation of the Wage and Hour law. A certified copy of the complaint was introduced as Exhibit 111 (R. 1449, reproduced at R. 1569). At the time of the filing of the suit a writ of garnishment against the S. S. Kresge Company was applied for seeking to tie up $40,000.00 owing to the Pottery Company (R. 1578). Three of the plaintiffs in the Toledo suit (Eric Sopha, Alice Stoll, Andrew Hirsner, or Heisner) were also named as plaintiffs or designated parties in the present action (R. 279, 284). At least two of the plaintiffs (Carl

3. THE FINDINGS OF FACT BY THE SPECIAL MASTER

The findings of the Special Master, after pointing out that none of petitioners' asserted claims had been proved, discussed in detail the question as to whether any of the petitioners had started work ahead of starting time. This of course involved a determination as to what activities should be included as work. As to the broad claim that all the elapsed time between the particular minute when an employee punched the time clock on his way in to work in the morning, and the particular minute when he punched the time clock on leaving the plant after quitting work, must be paid for regardless of when the employees actually started or quit work, the Master found as a fact (R. 179) that this claim could not be sustained.

Noting that the testimony showed it to be the uniform practice in industrial plants for employees to punch the time clock several minutes before starting time (R. 1242-1244; 1341; 1359-60; 1459), and noting the testimony of petitioners' expert witness that the time of punching the time clock has no relationship to the time of starting work (R. 1459, 1460), and noting likewise the long estab-

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Starner and Robert Fitton) named in the Toledo action did not even know that they were being named as plaintiffs and did not at any time authorize the bringing of the suit in their names (R. 983-84, 999, 1063). Indicative of the character of this proceeding is the fact that it alleged (and the allegation was supported by affidavit of counsel for petitioners) (R. 1575), that Robert Fitton, who was named as a plaintiff, was required by the Company foreman to punch time clocks out and then return to work to finish oiling molds (R. 1573). The fact is that Robert Fitton was the foreman, and his testimony is clear that he never permitted any employees to do this (R. 988-89). Certain it is that he never was ordered by himself to do something which was not a part of his job.

lished custom in all industrial plants that such time was not considered working time (R. 1237, R. 1340, R. 1460), and noting also the particular facts of the case—the lack of physical exertion, the lack of control by the employer, the freedom of the employee to choose his own course through the plant, his freedom to interrupt his trip to converse with other employees or otherwise spend his time as he pleased, and all the other factual conditions which indicated that walking from the time clock to the place of work was no different *than walking* from the employees' home to the plant—the Master found as a fact that the time so spent was not working time.

The Master also found that in some instances an employee might have arrived at his place of work before the starting hour, and he found the fact to be that in such instances, if employees arrived in their department early enough to have some waiting time, they were free to and did in fact spend such time on their own behalf; frequently spending their time in conversation with other employees (R. 183, 185, 199). The Master further found that while it could not be determined from the evidence how much time any employee might have thus spent in his department before starting work on any day or during any week, yet under the conditions which were shown to exist, the time involved could not be deemed working time.

The Master also gave painstaking consideration to the question as to whether petitioners performed prior to the regular starting time any preliminary or preparatory activities which might be said to be a part of their hours of work. The Master found that many of these activities were purely personal in nature. In some of the departments there were no such preliminary activities. This was true, for example, in the glost belt department, the

largest department in the plant (R. 170). In other departments, the employees would have nothing to do that would take more than a few seconds, such as picking up a brush, filling a pail with water, or picking up a sheet of decalcomania (R. 990-991, 1402, 1403, 1178). There was substantial testimony that these activities occurred after the regular starting time and not before (R. 989, 993, 1011, 1182, 1403).

The Master found that the amount of time spent in preliminary activities was not claimed to be more than two or three minutes (R. 174); and that in fact the amount of time so spent varied widely with the different departments, with different individuals in the same department, and with the same individual on different days (R. 169, 174).

There was found to be a similar variation as to when these preliminary activities were performed—whether before or after starting time. It was further found that neither the amount of time taken by such preliminary activities, nor the proportion of it (if any) spent in advance of the established starting time could be computed for any employee (R. 201). Therefore, whether or not such preliminary activities were "work" was immaterial to the case—the employees had not proved that any time spent in such activities would, if such time were counted as work, increase their total hours to the point where additional overtime payments would be required.

There remained the vital question on which the District Court refused to accept the Master's factual finding, as to whether actual production work started before starting time. The Master's report discussed this fully. It was noted that certain of petitioners' witnesses testified that they went directly to their department after

punching in and then started work. After carefully reviewing the testimony, pointing out that witnesses who so testified had been impeached (R. 180 et seq.); that their testimony was indefinite and inconsistent (R. 180, 183); that some of the petitioners' witnesses did not claim that they started work on arriving in the department (R. 180); and that a mass of circumstantial evidence tended to disprove this claim (R. 183-191), the Master refused to accept this testimony.

Instead, he accepted the testimony of the Company's witnesses (which was not impeached, and was supported by circumstantial evidence and by admissions obtained from many of petitioners' witnesses on cross-examination) that work did not start until the established starting time (R. 191).

He recognized the possibility (R. 191) that in some instances an employee might possibly have started work shortly prior to the starting time—in rare cases where an employee might have "jumped the gun" a minute or two (R. 173). The Master did not find as a fact that this had happened. He recognized it only as a possibility, which had not been definitely disproved. As to this possibility, the Master found the fact to be that if in some instances work was commenced shortly prior to the regularly established starting time, such instances were counterbalanced by occasions when work was started after the starting time and by admitted occasions when work was stopped several minutes before quitting time (R. 191).

4. THE JUDGMENT OF THE DISTRICT COURT

On objections to the report of the Special Master (R. 218), the District Court, without taking additional testimony, concluded that "while in the main agreeing" (R.

241) with the findings of the Master that the allegations of petitioners as to starting work early were not true, nevertheless a limited recovery should be allowed some of the petitioners, on the theory that they may have started actual work before starting time.

With this one exception, all of the findings of the Special Master were confirmed and adopted by the District Court (R. 272). The District Court specifically held that on the facts here involved, working time did not begin the moment when employees punched the time clock (R. 244). The District Court likewise affirmed the Master's finding that under the circumstances of this case the time spent by employees in punching the time clock and walking to their departments and there perhaps, on occasion, waiting for their fellow workers to arrive, was not working time (R. 241-244; see also R. 396, 397, 1494, 1499). Instead (as pointed out in the petition for certiorari, pp. 7, 9), the District Court held that time spent in such activities, was on these facts not to be deemed hours of work.

The District Court found no error in but rather disregarded the finding of the Master that if in some instances work was commenced shortly prior to the regularly established starting time, such instances were counterbalanced by occasions when work was started after the starting time and by admitted occasions when work was stopped several minutes before quitting time. The District Court, in fact, in its opinion specifically referred to the circumstance that at the close of work many personal duties occupied the employee's time before he actually punched out (R. 244); but while thus accepting this finding of the Master, the District Court completely overlooked it in reaching the formula described below.

The District Court's judgment was based on the premise that a recovery should be allowed those petitioners who had entered the factory earlier than the Court believed was necessary to have permitted them to start work at starting time. In view of the fact that the District Court was of the impression that most of the employees normally punched the time clock more than seven minutes before the time set for starting work, and in view of that Court's conclusion that if the employees were in the plant more than seven minutes before starting time it would be possible and in fact likely, as the Court thought, that the employees would begin work early; the Court adopted the formula that there should be added to the hours of work of each employee the number of minutes by which the time when such employee punched the time clock preceded seven minutes to starting time at the beginning of the day, or preceded five minutes to starting time at the beginning of work after lunch (R. 244, 273). In other words, an employee who punched in at seven minutes before starting time in the morning would not be given credit for any extra work, but an employee who punched in at eight minutes before starting time in the morning would receive credit for one minute's extra work regardless of whether or not there was any testimony whatever that the employee started work before starting time; and an employee who punched in at ten minutes before starting time in the morning would receive credit for three minutes extra work, etc. In the afternoon an employee who punched in at seven minutes before starting time would receive credit for two minutes extra work, an employee who punched in at eight minutes before starting time would receive credit for three minutes extra work, and an employee who punched in at ten minutes before starting time would receive credit for five minutes extra work, regardless of whether or not

there was any evidence that such employees worked such extra minutes.

The District Court's Findings and Conclusions (R. 272) directed the Company to compute the amount due each individual under this formula. Such computations (R. 276), which were later incorporated as a part of the judgment of the Court, disclosed that of the 289 persons represented in the action, 45 had no claim for overtime under the formula, 59 had a claim of less than $1.00, 85 had claims between $1.00 and $5.00, 71 had claims between $5.00 and $10.00, 23 had claims between $10.00 and $15.00, 4 had claims between $15.00 and $20.00, and 2 had claims between $30.00 and $36.00 (R. 289). The total amount of extra compensation for overtime (figured as required by the Court's opinion) was $1,207.87 for 289 individuals; or an average of not quite $4.18, for a long period of time, representing an average of approximately one cent a day. Pursuant to the statute, liquidated damages in equal amount were added; and the Court directed the allowance of a $2,000 attorneys fee to be taxed against the employer as part of the costs (R. 297).

5. THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS

From the judgment so entered, the Company appealed to the Circuit Court of Appeals for the Sixth Circuit. That appeal presented the following principal points to the Circuit Court; (1) There was no evidence to support the arbitrary formula adopted in the District Court's opinion as the basis for its judgment, and the formula must be rejected as one based wholly on surmise and conjecture and inconsistent with admitted facts; (2) the Master's findings of fact were abundantly supported by the evidence and depended in part on the Master's im-

pressions as to the credibility and reliability of the witnesses, and since no clear error was asserted or found to exist as to any of these findings, the District Court should have accepted them under Sec. 53 (e) (2), Rules of Civil Procedure; (3) there was no evidence in the record as to whether any of the employees actually did work or could have done any work during the time they were in the plant before starting time; (4) in any event, the judgment should be vacated on the basis that extra compensation which respondent company had voluntarily paid the petitioners each year (equal to approximately four per cent of their annual wages) over and above their agreed wages and overtime, should be applied by way of set off to reduce and eliminate the amounts of extra compensation which the District Court had found to be due some of the petitioners.

The Circuit Court of Appeals found that the Master's findings of fact were all supported by substantial evidence; that none of them were clearly erroneous; that these findings of fact should therefore be accepted; that on the basis of these findings of fact it was clear under the decisions of this Court that petitioners' action must be dismissed (R. 1595, 1597).

Thus, the Circuit Court of Appeals accepted and adopted the Master's findings *in toto*. Most of them had been previously adopted by the District Court. This, then, is a case where the provisions both of Rule 52 (a) and Rule 53 (e) (2) (Federal Rules of Civil Procedure, 28 U.S.C.A. following Sec. 723 (c)) require that the Master's findings should not be set aside unless clearly erroneous.

The Circuit Court of Appeals further found that the arbitrary formula applied by the District Court pro-

duced a judgment based upon surmise and conjecture which could not be sustained (R. 1596).

Accordingly, the Circuit Court of Appeals ordered the judgment of the District Court reversed, and the cause of action dismissed.

II. Analysis of Testimony

1. GENERAL NATURE OF PROOFS

It appears from the record that each of the departments of the Mt. Clemens Pottery Company had established times for starting and stopping work (which were different for different departments and were subject to certain variations as production requirements changed, R. 1111, 1120), and that employees were permitted to check into the plant at any time during the 14-minute period preceding the starting time for their particular department, not for the purpose of beginning work, but only for the employees' convenience (R. 1112). The time clock cards did not show the time during which employees were required to be on duty, or to be on the Company's premises, or to be at any prescribed work place, but on the other hand showed rather the time of the employees' entry to or exit from the plant (R. 1125-1130). On entering the plant, employees punched the time clocks but did not begin work until an established starting time, and respondent did not suffer or permit any of the employees to begin work prior to the established starting time (R. 811, 1126). On or before the completion of the established working periods, the employees ceased working and were required to leave the plant within fourteen minutes thereafter, and the Company did not suffer or permit any of its employees to continue at work after stopping time (R. 1111). The employees were not charged with any

duties for periods (from one to fourteen minutes in duration) when they might be in the plant prior to the established starting time or subsequent to the established stopping time (R. 990, 1041, 1173, 1180, 1406, 1303).

In using the time clock cards in determining the hours of work, the Company computed working time as beginning from the established starting time (which normally would be the even quarter hour following the minute when the employee punched in) until the quitting time (which normally would be the even quarter hour preceding the minute when the employee punched out). Where an individual worked overtime, such time was added. This is in accordance with the regular practice in all plants, as testified by petitioners' witnesses as well as by respondent's witnesses (R. 1459-61, 1237, 1340). The practice was also supported by many years experience at this plant. It had been determined from actual observation over a period of years that intervals of fourteen minutes were necessary in order to permit the employees to reach their departments and be ready for work at the regular starting time (R. 1111-1127).

There was no proof and really no claim that any employee was deprived of credit for work performed after quitting time because of the Company's adherence to the uniform industrial practice of computing the termination of the employees' hours of work at the regular quitting time (i.e., the even quarter hour preceding the minute when the employee punched out). In fact, petitioners' witnesses freely admitted on cross-examination (and it was the finding of both the Master—R. 175—and the District Court, R. 244) that employees on frequent occasions quit work before the regular quitting time, but waited until after the quitting time to punch out.

We face then solely the question as to whether or not some of the employees occasionally started work before the regular starting time and whether any of them put in a few minutes more work than the Company's computations gave them credit for.

No proof as to this principal issue was offered by the petitioners except for the testimony of eight members and officers of the Union. The testimony of these individuals relates almost exclusively to their own claims; and there is no substantial testimony as to any of the other 280 petitioners ever having started work before the regular starting time, nor is there any proof whatever as to how many seconds, minutes, or hours that any of the eight witnesses or any of the other employees worked during any week, other than as shown by the records of the Company.

Furthermore, it is, we believe, not without significance that these witnesses, for the most part, contented themselves with saying that they punched their time cards and went to their department. Some of petitioners' witnesses, as will be pointed out in more detail *infra*, did not even venture the general assertion that on arriving at their departments they went to work. Obviously, witnesses who limited themselves to saying that after punching in they went to their departments have not established even a *prima facie* case. Other witnesses who testified in general terms that after punching the time clock they did go to their departments and started work, admitted that they could not say just when they started work, and conceded that if they attempted to fix any time prior to the established starting time as the time when they started work it would be only a guess. This circumstance was relied on by the Special Master (R. 180).

No compilations of any kind were introduced to support this very general testimony, although the Company's records had been available for petitioners' examination for many months, and although it seems obvious that, at least if any of the employees believed that they were working longer hours than they were given credit for, they would have had some idea as to how early they started work. We think this suggests that it is true of all the petitioners, as admitted by witness Metz, that it never occurred to them that they were working more time than the records of the Company showed (R. 651).

It is significant that less than 300 employees or former employees (out of a group of 1200 employees and as many as 500 additional former employees) elected to join in the suit, despite the solicitations that were made (R. 585, 705, 782, 956). This indicates that the vast majority of employees knew they had no just claims.

The eight petitioners who testified represented only four departments out of the twelve departments in the plant whose employees were involved, viz: the Clay Shop, the Decorating Department, the Brushing and Dipping Department, and the Glost Belt Department. Since somewhat different considerations are applicable in the different departments, we shall examine in some detail the testimony as to each department on the issue of whether work ever started before the established starting time. However, certain of the facts are generally applicable to all departments, and these may be discused at the outset.

2. ESTABLISHED CUSTOM OF INDUSTRY

As above noted, it was the practice of the Mt. Clemens Pottery Company to compute as hours of work the time elapsed from the regular starting time to the regular

quitting time, and to exclude periods not in excess of fourteen minutes which were allowed to employees to come in to work and to go out. It should be borne in mind, also, that ordinarily much less than this amount of time was taken by the workers. As shown by the cards, most of the punch-ins occurred during the period between fourteen minutes and five minutes before starting time; and most of the punch-outs occurred during the first ten minutes after the hour, many of the workers quitting work before quitting time so as to reach the clock a minute or two after quitting time.

If this practice is in violation of the Wage and Hour law, then practically every employer in the country is likewise violating the law. The testimony is uncontradicted (and it has come from petitioners' witnesses as well as from respondent's witnesses, R. 1459) that the universal practice is to compute hours worked from the regular starting time to the regular quitting time.

Joseph D. Fox, a witness called by the defendant, who formerly had been an inspector with the Wage and Hour Division of the United States Department of Labor and was at the time of the trial connected with the Industrial Advisors Bureau (R. 1235) and who had inspected some 350 plants and examined thousands of time clock cards (R. 1241), testified that the general practice in computing hours worked is to assume, if an individual has punched in at or before the regular starting time and has punched out after the regular quitting time, that he worked from starting time until quitting time (R. 1237). He never had found a plant which computes hours worked from the minute the employee rings the time clock (R. 1237). The usual requirement is that the employee be in his department ready to work at starting time (R. 1239). He did not know of any plant that only required the employee

to pass the time clock at starting time (R. 1239). The time clock, he had found, is used primarily as an attendance record; and that the employee is expected to be at his bench and ready to work at starting time. It was his experience that time clock cards are normally punched from five minutes to twenty-five minutes before starting time (where employees live within easy streetcar distances of the plant) and often an hour or more before starting time where workers come from greater distances (R. 1242). He testified that examination of a sampling of the time clock cards of the Mt. Clemens Pottery Company indicated that the interval between the punch-in time and the time when work started was the same as in other plants (R. 1244).

Mr. Pierce E. Wright, who had been engaged in labor relations work for twenty years and was familiar with the practice in some 100 factories in Michigan (R. 1339), similarly testified that hours of work are customarily computed from the starting time to the quitting time (R. 1340) and that actual studies he had made revealed that most employees punched in six minutes to fourteen minutes before starting time, with the greatest bulk from nine to fourteen minutes before starting time (R. 1341). This is true in plants where employees are not allowed to punch in more than a quarter of an hour before work begins. In plants where thirty minutes leeway is allowed (see Ex. 66-73, R. 965, 1350, 1463, 1473, reproduced at R. 1537-1542), many workers come in more than a quarter of an hour before starting time (R. 1341). Mr. Wright also testified that the time clock cards of the petitioners' witnesses showed patterns of punch-ins and punch-outs which were entirely typical of the general pattern he had observed in studying more than ten thousand cards (R. 1359). He pointed out that there is nothing unusual

about an employee punching in a time clock at fourteen minutes before starting time every day for two weeks or more in a row, because some workers are invariably "early birds" and are at the plant when the time clock opens, and the first twenty-five men to go in will all have their time recorded at fourteen minutes to the hour (R. 1359-60). He further testified that these practices are customary in plants operated under collective agreements (R. 1361), and he prepared (R. 1350) a compilation of clauses from collective agreements and shop rules illustrating the general practice (Ex. 92, R. 1350, 1473, reproduced at R. 1549).

Similar testimony was given by Mr. James H. Wishart, Research Director of the United Automobile Aircraft and Agricultural Implement Workers, CIO, who was called by petitioners as an expert (R. 1450). He explained that employees in most plants operating under agreements with his union, the U.A.W.-C.I.O., are allowed to come in as much as a half hour before the actual beginning of work, and that they stand around smoking and gossiping, and that they take their coats off and punch the time clock and are expected to be in their departments at the regular starting time (R. 1459-60). He said, "the punching of the time clock is immaterial in determining the exact beginning of work" (R. 1459), and explained that the punching in does not bear any relationship to the actual starting time, the time clock being used primarily to indicate the presence of the worker in the plant for that day (R. 1460). He added, "the actual punching of the clock will not coincide with the starting of work" (R. 1460). Using almost the same words as respondent's expert witnesses, he said further that if the employee is punched in and is in his own department, it will be assumed, under the general practice, that he starts work at starting time (R. 1460).

One of the petitioners' witnesses, Earl Larimer, who at the time of the hearing was employed at a large plant in Detroit where the employees are represented by a CIO union, testified that in that plant he usually punched in thirty minutes early and was supposed to be on the job when the starting whistle blow, and that his hours of work were figured from the starting whistle to the quitting whistle (R. 711). As an instance of the common practice, it is interesting to note that in *Ackroyd, et al. v. Chrysler Corporation*, Case No. 3573, in the District Court of the United States for the Eastern District of Michigan, Southern Division, paragraph 11 of a stipulation of facts agreed to by the parties therein, and placed in the Court files, sets forth that from October 24, 1938 to June 27, 1942 hourly rate employees, not including plant protection employees, of Chrysler Corporation in the Detroit area, rang in at their time clocks on the average of 16.58 minutes *before their work began each day.* That case involved a claim by several plant protection employees in the Chrysler plants in the Detroit area that they started work before the regular starting time, having certain duties to perform before shift time.

It is interesting to note that the Mt. Clemens Pottery Company differs from most pottery companies in that it employs a time clock card system, even for workers who are employed on a piece-rate basis, as are some 98 per cent of the employees of respondent (R. 1226, 1280). Eighty per cent of the pottery industry operates under a collective agreement (to which the Mt. Clemens Pottery Company was formerly a party, R. 1278) under which it is provided that time clocks may be installed only through an agreement entered into between the plant and the local union (R. 1109). In most potteries, the custom is to use time clocks only for a few hourly-rated employees, and

the only record kept as to the hours of work of all the other employees is in the form of a time book kept by the foreman showing the number of hours which each employee worked each day (R. 1108).

3. REASONS FOR FOLLOWING THIS METHOD OF COMPUTING HOURS WORKED AND FACTORS SHOWING ITS FAIRNESS

Time clock cards were put into general use in the Mt. Clemens Pottery Company about 1933 (R. 1109). The same method of computing hours of work has been followed ever since that time (R. 1110, 1184). The Company's determination of the number of hours each employee has worked is recorded daily on the time clock cards themselves, and each employee knows each day the hours of work that have been recorded for him during the preceding days (R. 1110). The testimony of all the employees and former employees who were asked about this, including both petitioners' and respondent's witnesses, was uniformly to the effect that all the employees understood this system; and that it had been employed without variation since 1933. The practice of recording on the time clock cards a notation of the number of hours worked daily was primarily for the convenience of the employees. The Company also kept permanent records showing the hours of work of each employee and all other data required by the regulations of the Wage Hour Division, e.g., Ex. 80 (R. 1150, 1300, reproduced at R. 1544). It must be clear that the Company would not have continued this practice had it wished to evade the law.

As a matter of fact, under the employment contracts of the petitioners it would have been neither inconvenient nor expensive to the Company to have reversed the system and charged an individual with having started work

at 7:00 o'clock if he punched in between 7:01 and 7:15, and charged him with having worked until 4:15 if he punched out at any time between 4:01 and 4:15. It is clear, and was admitted (R. 595, 597) that this practice would have an adverse effect on the employees in that it would decrease the actual working time available in a forty-hour week and decrease the earnings of employees whose earnings depended on what work they produced in the forty hours allowed.

Furthermore, if the Company had been making an attempt to "gyp" the employees as had been so persistently charged, it is hard to explain why the Company voluntarily increased the rates of pay (R. 188, 647, 444) or why it voluntarily set up and carried out a scheme for paying extra compensation under which employees got two weeks extra wages annually (R. 1161) and continued to make these payments even though it was under no agreement with the employees that any such payments would be made (R. 1161).

Of course, if the employer had attempted to give the employees credit for less hours than those actually worked, it would have followed the custom (which is entirely permissible under the law and so recognized by the Wage and Hour Division, and is, in fact, very common in the pottery industry) of having the foremen record in a time book each day the number of hours that each employee worked that day. If this system had been followed, the Union could not have concocted the novel theory here presented, for there would not be a clock card record of the time employees entered the plant. Of course, the same amount of time at least would have been required to get employees in and out of the plant.

Again, had any question ever been raised by the employees, as it doubtless would have been (R. 190), had it

ever occurred to the employees that they were working longer hours than the Company records showed (R. 651), it would, of course, have been easy for the Company to have divided the work among the employees so that instead of working five days one week and four days the next week (which was a typical pattern, as shown by the time clock cards in evidence), the employees would have worked four and one-half days each week. This, again, would be a practice which would not cause any added expense or inconvenience to the Company but would have been inconvenient to the employees. It would have reduced the total hours of many if not all employees to a total of less than 40 a week, however figured.

We think the only conclusion which can be reached from these circumstances is that the reason for using this method of computing time was not that it permitted the Company to cheat or defraud employees. Rather, the reason for the practice, both in this plant and in all other plants, is the impossibility of getting all the workers in at once. Many plants (R. 1341, Ex. 66-73, 92, R. 965, 1350, 1463, 1473, reproduced at R. 1537-1542, 1549) set up a 30-minute period for the purpose of getting employees into the plant. This Company, however, reduced the period to fourteen minutes, which experience showed to be the minimum time required (R. 1111). The employees of the Pottery lived in various parts of Macomb County and many of them drove to work in automobiles; and it has been true for many years that a majority perhaps of the employees figured on leaving home early enough so that they could reach work in time even though they experienced a flat tire or some mechanical difficulty en route (R. 1276, 677). If they had no trouble, they often arrived early. To permit an orderly system of operation and an accurate determination of the hours of

work of each employee, the Company (many years before the Wage and Hour law) determined the minimum amount of time required to permit the employees to pass through the time clocks, reach their departments, and begin work. It was found that this minimum was fourteen minutes. The result was that employees were instructed that they must not punch in at the time clock more than fourteen minutes before starting time and were instructed not to start work before the starting time (R. 811, 1018, 1126; Tr. 2534).

These matters are reviewed in the report of the Special Master, and the Special Master considered that such circumstantial evidence was persuasive, particularly in view of the conflicting and inconsistent testimony of the petitioners (R. 183).

4. FACTORS SHOWING PHYSICAL IMPOSSIBILITY OF EMPLOYEES STARTING WORK IMMEDIATELY AFTER PUNCHING THE TIME CLOCK

a. Size of Plant

In the first place it must be borne in mind that this plant is nearly a quarter of a mile long (R. 968) and more than 8¼ acres are under roof (R. 968). There were two time clocks in the plant during nearly all of the period involved (R. 968—a third was later added) and there were normally about 200 employees or a little more punching through each time clock during the 14-minute period preceding the start of each shift (R. 1121, 1276; Ex. 97-99, R. 1378, reproduced at R. 1555-1567; R. 1168).

b. Time Required to Pass Time Clocks

The average rate at which employees can punch through a time clock is approximately twenty-five per minute. This was established by the testimony of Charles E. Doll, Sr.

(R. 1125), C. E. Doll, Jr. (R. 1228), and Pierce E. Wright (R. 1341). As a matter of arithmetic, it is clear that it would take a minimum of eight minutes to get the 200 employees through the time clock, if they went by in a steady stream. As a practical, everyday matter, more time was ordinarily consumed (R. 1120, 1125, 1014, 1168, 1399). Petitioner Metz said it would take three or four minutes for 50 or 60 persons to pass the time clock (R. 643). This would be not more than 20 persons per minute.

c. Time Consumed in Reaching Department

It would, therefore, be five or six minutes to starting time, at the earliest, before the employees could have passed the time clock. However, work could not start at five or six minutes to starting time, even if most of the employees had entered the plant at that time. Various circumstances would prevent this. In the first place a certain amount of time would be taken for the employees to reach their departments. Also, it must be remembered that in most departments the employees worked in groups and there was nothing to do until the last employee in the group had arrived.

d. Activities After Employees Arrived in Department

After punching the time clock, employees frequently stopped at the toilet rooms or at a drinking fountain, and engaged in various personal activities before starting work (R. 1416). Many of them spent the time visiting until the starting whistle blew (R. 1126-1127).

e. Time Not Worked During Day

It stands uncontradicted on the record that employees were permitted to stop production when they so desired at various times during the day. For example, they

sometimes mixed up soft drinks and quit work for a period of relaxation (R. 1175). Obviously, they were permitted much more freedom in this respect in a piecework plant than would be found in an hourly-rate plant. It is also uncontradicted (in fact, employees who were asked about it freely admitted) that on numerous occasions they would complete work before quitting time and then spend some time cleaning up, chatting with other employees, etc. until quitting time had arrived (R. 1129, 656, 728). An estimate as to the amount of time lost each day under these circumstances was made by Charles E. Doll, Sr., General Manager of the plant, who spends more than half his time in the shop (R. 1118). He stated that certain studies had been made and that his own observation indicated that employees take as "time out" between twenty-five and thirty minutes in the course of an ordinary work day (R. 1282).

f. Group Operations

Most of the employees worked in groups, and no member of the group could start work until all (or practically all) of the members of his group were on hand. The Special Master referred to this as "the most important circumstantial factor" (R. 183) supporting his conclusion that employees did not start work before starting time.

In the clay shop, where the ware is formed, some employees were employed in groups of three, and the others were employed on large machines operated by groups of 20 to 25 persons. In the former case, work could not start until all three operators were ready to begin, and in the latter case operations could not start until practically the full crew was on hand (R. 984, 985). This is described in the Master's Report (R. 184).

In the brushing and dipping department, most crews consisted of a brusher, dipper, and finisher, none of whom could work until the others arrived (R. 1169-70, 184, 526, 777). Some employees were engaged on large dipping machines, which could not be put in operation until practically the entire crew was present (R. 1186, 1167, 184).

In the glost belt department, the situation was even more striking. There, operations could not begin until nearly all the employees in this department and the adjoining chipping department—some 165 employees—were on hand (R. 1230-31, 441, 927, 184).

There is no evidence in the record that there was a full crew present before starting time on any day, as to any group, machine, or department. Yet it is clear that no member of any group could start work until the last member had come in, and this might be ten minutes or more after the first arrival.

5. WORKERS WHOSE JOBS DIDN'T PERMIT THE STARTING OF WORK BEFORE AN ESTABLISHED STARTING TIME SPENT THE SAME AMOUNT OF TIME IN THE PLANT BEFORE WORK AS DID OTHER EMPLOYEES

In some job classifications, employees worked around the clock in three eight-hour shifts. On these jobs, the employee coming in to work could not begin until his predecessor had quit. It was not possible for these employees to work over eight hours, and it was not claimed that these employees started work ahead of time. Yet these employees punched in as early as did the others.

One such group comprised the pressmen in the slip house (who mix the clay and other ingredients from which the ware is formed, R. 1087). It is uncontradicted on the record that it would be impossible for two crews to be working at the same time in the slip house (R. 1283,

1386). One crew is at work until its quitting time, when it is relieved by the other (R. 1283). Furthermore, since the three crews worked twenty-four hours a day and each of the crews was credited with eight hours worked, it appears a physical impossibility to conceive of the three crews (succeeding each other on the particular machines which they used) working an aggregate of more than twenty-four hours a day. Because of a particular situation (they were paid on a group piece-work basis, and the number of hours worked during each shift had no bearing on an individual's earnings—R. 1384, 1385) it could have made no difference in their earnings if they had started work a little early or a little late. There was no inducement to them to begin work before starting time. But as shown in detail on Exhibit 101 (R. 1385, reproduced at R. 1564) these employees usually punched in at the time clock from ten to fourteen minutes before starting time. The only explanation which can be given for the punch-ins of the pressmen is that it was convenient for them to allow this period of time to get over to their department and get started to work at the regular time.

A somewhat similar situation is observed in the case of the kiln firemen. These employees work on eight-hour shifts, which are maintained twenty-four hours a day and 365 days a year (R. 1092). Each shift is entirely in charge of the operation of the kilns from its regular starting time until its regular stopping time (R. 1093). It is impossible for two crews to be working at the same time (R. 1283). It would seem, therefore, to be physically impossible for the employees in this group to have worked more than twenty-four hours a day or more than eight hours on each shift. Furthermore, there could be no inducement to them to do so, because employees on this

job were paid on the basis of the number of cars of ware that pass through the kilns during a pay period, and the compensation of an employee did not depend on the number of cars which his crew put through the kilns during his eight-hour shift (R. 1379). Exhibits 100 and 100-A (R. 1382, reproduced at R. 1558), however, show that these employees likewise frequently found it convenient to punch in twelve minutes or more before starting time, so as to be ready to go to work at starting time.

The same observation could be made as to the boiler firemen. The Company's boiler room is in operation twenty-four hours a day and is cared for by firemen working in eight-hour shifts (R. 1389). One man succeeds another, tending the same boiler (R. 1102). Here, again, it would be impossible for two boiler firemen to be working at the same time (R. 1283). Furthermore, there was no inducement to them to start work before starting time because they were paid simply on a straight hourly rate (R. 1389), and there was obviously no personal advantage to be gained by attempting to start work a minute or two ahead of time. Nevertheless, as shown on Exhibit 102 (R. 1391, reproduced at R. 1556), the boiler firemen punched in the same period before starting time as did the individual piece workers. The situation in these three departments, we believe, indicates exactly what happened all through the plant. Various employees in the departments above described were represented in this action (Ex. 44, R. 791—Original physical exhibit transmitted to this Court). None of them, of course, was called as a witness—for the reason, we submit, that it could be readily demonstrated that it was impossible for them to work any longer hours than the records of the Company showed. And we submit the fact that the punch-in pattern is the same throughout the plant, as

well in cases where work could not possibly start before starting time as in cases where there was a possibility of this, indicates the truthfulness of the testimony of the respondent's witnesses who said that, in fact, work did not begin until the regular starting time or thereafter in any department. This is in accordance with the Master's finding (R. 191).

6. NO REQUIREMENT THAT EMPLOYEES PUNCH IN BEFORE STARTING TIME

It was conclusively established on the record that employees were not required to punch in fourteen minutes before starting time. In the first place, the time clock cards of the petitioners and other employees show that they did not regularly punch in at any such time. In the second place, it was impossible for more than about twenty-five employees to punch in that early on either clock for any shift. In the third place, petitioners' witnesses admitted they were not considered late if they got there by starting time (R. 485, 756).

7. THE COMPANY REDUCED WORKING HOURS AND INCREASED PERSONNEL

It is undisputed that the hours of work of the employees of the Mt. Clemens Pottery Company were reduced from forty-five hours per week in 1937 to forty-four in 1938, and then to forty-two in 1939 and finally in 1940 to forty hours per week, in accordance with the graduated schedule enacted by the Fair Labor Standards Act. The petitioners testified to this effect, and their testimony was supplemented by that of respondent's witnesses (R. 511, 658, 1279). The matter of compliance with the Wage and Hour law frequently was discussed at foremen's meetings which were held weekly, and the

foremen were repeatedly advised that they must schedule operations in their departments so as to permit the completion of their work within the statutory straight time maximum hours, except in cases where special circumstances required that employees work overtime (R. 1162, 987, 1008, 1405). There is also no question about the fact that ten or twenty individuals worked overtime and were paid at overtime rates therefor each week (R. 1163).

It also is clear that the reduction of hours made it necessary for the Company to put on additional employees (R. 1279, 1211). The enlargement of the personnel, however, did not neeessitate any substantial additions to the plant's capital equipment (R. 1217) although some minor pieces of equipment were acquired (R. 1279); and the reduction of the number of hours of work together with the hiring of new employees did not increase the Company's cost of production (R. 1217, 1280). If, in fact, the Company had been able to surmise that the claim now made would be advanced, it would have been simple for the Company to have added a few more employees and followed a system of charging each employee with having been at work from the even quarter hour preceding the time he entered the plant until the even quarter hour following the time he left the plant. This would not have increased the Company's cost of production (R. 1280) although it obviously would be a hardship on the employees, since it would decrease their earnings—the Company being obliged to limit them to forty hours a week (R. 1212). It is absurd to suggest, when all these things are considered, that the Company—in continuing to follow the meticulous record-keeping system it employed, despite knowledge that a more lax system was permissible under the law (R. 1112-1114)—was "gypping" employees.

III. Detailed Review of Evidence As to Time of Starting Work

We have summarized above the general nature of the proofs, explaining how the Company computed the working hours of the employees, giving the reasons for the adoption of this method, showing that it is in conformity with the uniform practice in industry, explaining in general how the employees spent their time after punching the time clock and before going to work, and stating the principal factors which must be considered in reviewing the claims of the petitioners that they worked longer than the Company's records showed.

Later in the brief, it will be necessary to consider in some detail the testimony of the employees, as a part of our argument that there is utterly no support even in their own testimony for the findings of the District Court.

But all of this leaves out any treatment of the testimony of the Company witnesses and the eloquent though mute testimony of indisputable physical facts, on the central issue as to when work started in each department, with reference to the starting time. Some twenty-three trial days were devoted to a detailed examination of this question. While we desire to avoid burdening this Court with a detailed reiteration of the testimony on these matters of fact; nevertheless, we believe that, since the central issue of the whole case is whether or not the Master committed clear error in finding that the plaintiffs did not start work before starting time, we should make available for the use of this Court some summary of all the evidence as to when work started in each of the four departments referred to in petitioners' testimony.

In so doing, we are constrained by considerations as to the length of the brief from reviewing the testimony in as much detail as we think would be helpful. It will be necessary for us to omit reference to many factors bearing on the credibility of witnesses and circumstantial indications as to the truth or untruth of petitioners' claims. These matters are set forth in considerable detail in the Master's report, which includes a very careful review of all the testimony, set forth in greater length than may be done here. Adopting the Master's review of the testimony on working time (R. 176-191) for a comprehensive statement, we wish in the following section to direct the Court's attention specifically to certain details that are particularly relevant in view of the determination of the District Court.

We think this can be accomplished with greatest economy of space by reviewing as to each of the four departments: (a) physical and mechanical factors affecting time when work began; (b) preliminary operations that might be performed before production started: (c) testimony as to the time when production started.

1. CLAY SHOP

a. Physical and Mechanical Factors Affecting Time When Work Began—Group Operations

The Clay Shop is located in a large room more than four hundred feet long (Ex. 30-A, R. 973, reproduced at R. 1524). Employees working in this department must travel a distance ranging between 400 and 800 feet from the time clock to reach their place of work (Ex. 65, R. 973, reproduced at R. 1536).

In this department, where ware is formed, employees work either on the so-called mangles or on the so-called machine jobs.

In case of mangles, a crew composed of three employees is engaged in making flat ware or oval ware. None of the three individuals could begin work until the entire crew was there (R. 984). This was freely admitted by the petitioners as well as by respondent's witnesses (R. 645, 728). In this connection, it is significant to observe that in instances where one member of a crew may have punched in twelve or fourteen minutes before starting time, other members of the crew may not have punched in until a minute or two before starting time (R. 678-680). In such cases, none of them could start work until after the starting time, as petitioners admitted (R. 648).

On the so-called machine jobs, some twenty to twenty-five persons were employed on a machine. Operations could not start until practically the full crew was there, and the machines never were put in operation until the established starting time for the department. In the case of employees working on the machines, there was no possibility of their having started before starting time, and it is significant that no witness made any such claim (R. 985).

There were approximately two hundred persons going through the time clock at the beginning of each shift in this department (R. 1276) and, therefore, eight or nine minutes would be the minimum amount of time necessarily consumed to get the full crew past the time clock.

b. Preliminary Activities

Employees would not show up in the department until six or seven minutes before starting time at the earliest, and many of them arrived after starting time. It was frequently ten minutes or more after starting time before all the employees were at work (R. 991, 994, 998, 1011, 1053, 1055, 1056).

After a clay shop employee reached his place of work, he sometimes (but not daily) spent a little time preparing himself for work. Some of the petitioners estimated that two or three minutes might be spent in preliminary activities of one sort or another (R. 174, 640, 727, 696). But it was clear that there was nothing to do that could not be accomplished in a few seconds.

Fitton, who worked as a jiggerman for a long time before becoming foreman (R. 991) testified that a jiggerman had no odd jobs to perform after arriving in the department except to bend his scrapper, which is a personal tool like a carpenter's saw or a bricklayer's trowel (R. 992), and this takes the jiggerman about a second (R 990). The water is brought to the crews by other employees, and the clay likewise is brought to them (R. 990). The time in the department before the starting of work was actually spent in visiting (R 1003). Witness Starner, a foreman, explained that he usually arrived at the plant about an hour before starting time to make sure that the clay was at the stations, that the electric dies were turned on, and that everything would be ready to begin work at starting time (R. 1010). While it is clear that employees spent varying periods of time in the department before starting production, it is equally clear that no employee made any showing that he reg-

alarly and before starting time did anything that would take more than a few seconds to perform, that could possibly be considered work.

As pointed out in the Master's report (R. 174, 201) petitioners did not establish that any of these preliminary activities, except perhaps such purely personal matters as putting on overalls or gloves, were performed before the regular starting time. On the contrary, there was much testimony that preliminary activities occurred after the regular starting time (Master's Report, R. 174, 191). This finding of the Master was not revised by the District Court.

c. Start of Production

Former Clay Shop employees who testified for petitioners were extremely vague in their statements as to when work started. Metz, on direct examination, said that he went to the department after punching in (R. 610). He was not asked what he did after arriving in his department. On cross-examination, he admitted he sometimes didn't start work until after starting time (R. 648). He said that it was sometimes as early as five minutes to 6:00 that production started; and that, on the other hand, it was after 6:00 on days when one of his crew didn't punch in until three or four minutes to 6:00 (R. 648). He admitted that he had no recollection as to when production work started on any particular day (R. 665, 678).

The testimony of Larimer, petitioners' other witness from this department, was uncertain and in several respects inconsistent (C.f., R. 726, 727, 728). The Master (who heard him testify) did not accept his statements.

On the other hand, Fitton, respondent's witness, was positive that employees did not start work before 6:00 (the regular starting time) and said that it was frequently fifteen or twenty minutes after 6:00 before they all started (R. 989). He explained that at 6:00 o'clock he would go around the department and never did he have the experience of finding most of the employees ready to work at that time. He said that it was very seldom that anyone would be ready to work by 6:00 (R. 993). While conceding that some employees might occasionally be seen fixing their scrappers at one or two minutes before 6:00 (R. 994), he said he never saw them even making this preparation as early as five minutes before 6:00 (R. 994). It was a very frequent occurrence to see the employees stop and visit on the way in (R. 1005).

Starner said that on the average, people would actually get started to work a little bit after 6:00 (R. 1011). He would always wait until after six o'clock before he would even think that someone was not coming (R. 1017). Employees were often five or ten minutes late (R. 1017). He did not permit employees to start work before 6:00 (R. 1018). He conceded that there may have been occasions when a particular crew, if they all got there early, might have started a minute or so before 6:00, but said that he never had seen any crew start as early as five minutes before 6:00 (R. 1024). It was possible that someone might start work a minute or two before 6:00, but not earlier than that (R. 1061).

The Master found that production did not regularly start until the scheduled starting time (R. 191). He further found that if on occasions particular employees started work very shortly prior to the established starting time it was counterbalanced by occasions when the em-

ployees started late and quit early (R. 191). This finding, resting upon the Master's determination as to the credibility of witnesses who testified before him in the course of a lengthy trial, was not reviewed by the District Court, nor did the District Court point to any error in this finding.

d. Conclusion as to Clay Shop

We submit it was established that clay shop employees started work at or after the regular starting time, and frequently quit early. At least, there is no contrary evidence in this record other than an admitted guess (R. 611, 727). Petitioners' witnesses (R. 648, 656, 728) admitted it was sometimes after six o'clock that they started. It is clear, also, on the record that in many cases when one individual in a group punched in early, another member of the same group would punch in later, and that work could not start until the entire group was there. There would be no means of determining even the maximum possible number of minutes that work could have started prior to starting time without analyzing the clock cards of each individual's entire group for each day. The testimony of the respondent's witnesses, which was in no way directly contradicted by the petitioners, was clear that it was generally a little after starting time before work actually started.

The petitioners did not undertake in any way to contradict the statement of respondent's witnesses that frequently employees quit work ten minutes before quitting time (R. 1025). In fact, they conceded that they often quit before quitting time (R. 669, 728).

2. DECORATING DEPARTMENT

a. Physical and Mechanical Factors Affecting Time When Work Began

In this one department (in which nearly all the employees were women) there was nothing which physically prevented an employee, if she in fact arrived in the department early, from commencing work before the regular starting time. However, there is no claim by any of the witnesses that any of the girls in this department did start work before the regular starting time.

b. Preliminary Activities

The only witness called by petitioners from this department did not refer to any preliminary operations that were required before she could start production. There were, in fact, very few. The "decal" girls would get their varnish, take ware to their benches, clean their brushes, and put on their aprons. This would take a few seconds (R. 1402). The liners would only have to pick up a bottle of liquid gold and soften their brushes (R. 1403). The girls would begin to come into the decorating department at about five minutes after 7:00 (R. 1399), and would come straggling in for the ensuing fifteen minutes, some employees coming in late every day (R. 1399). As the girls arrived they would congregate at various places within the department and spend their time talking and visiting until 7:15, the starting time (R. 1401, 1417).

c. Start of Production

The record is barren of any testimony by any of the petitioners as to the time when work started in the decorating department. The single witness called by petitioners as to this department, testified it took her a minute or two to get from the time clock to her bench, and that

ordinarily she went from the time clock to her bench (R. 846). She did not claim she started work when she got there. The testimony is uncontradicted that at 7:15 each morning the foreman, Mr. Trabue, would get up from his desk and make the rounds of the department and tell the girls that it was starting time (R. 1399-1400). Most of the girls waited for this announcement to begin preparing their brushes to go to work (R. 1403). Some of them would have their brushes ready and would have obtained their materials before 7:15, but in most instances they did not do this until after 7:15, the starting time in this department (R. 1403).

d. Conclusion as to Decorating Department

There is no testimony as to any employee in the decorating department having worked longer hours than shown by the records of the Company. On the other hand, we think the uncontradicted testimony of Trabue establishes beyond any doubt that he was correct in testifying (R. 1406) that the girls actually worked fewer hours than shown by the Company's computation of hours worked. No claim was made by employees in this department that they were instructed or required to punch a time clock or be on the premises at any time before starting time. Indeed, Miss Freddle said the Company's computation showed the hours she worked (R. 862).

3. BRUSHING AND DIPPING DEPARTMENT

a. Physical and Mechanical Factors Affecting Time When Work Began—Group Operations

In the brushing and dipping department, the glaze is applied to the ware. After the ware has been given its initial baking in the bisque kilns it comes to the brushing and dipping department. The first operation is that girls

brush dirt off the ware and it is then dipped either manually or mechanically in a solution of glaze; and after the dipping, excess glaze is sponged off by the spongers (R. 1094).

The manual operations are performed by groups of three persons—a brusher, a dipper and a sponger. The dipper cannot begin work in the morning until the brusher has arrived and brushed some ware (R. 1169-70). The sponger must wait until after the brusher has brushed some ware and the dipper has dipped it (R. 1169). Until the entire group is present neither the brusher nor the dipper nor the sponger can begin work. This was admitted by the petitioners (R. 777, 525).

Some of the dipping is done on the so-called automatic spray glazing machines. These have the appearance of a large circular drum some twenty feet or more in diameter (R. 1219). These machines cannot be put in operation until practically the entire crew is present and the employees can't do any work until the machine is started at the regular starting time, which is normally 7:00 o'clock (R. 1186, 1167).

We have a situation then where those employees working on the machines cannot ever begin work until 7:00 o'clock and employees working on the manual operations cannot start work until the entire group is present. As to the former, there is no claim of work starting ahead of time; and as to the latter, a finding that any employee started work before 7:00 could not be supported except by a finding that his entire group was present before 7:00 on that day.

As above pointed out, there is no proof that any one crew was assembled before starting time on any day. The indications are the other way (R. 579-583).

This department is located some distance away from the time clock "B" (See Ex. 30-A, R. 973, reproduced at R. 1524), which is used by employees in this department.

Approximately 200 employees customarily used time clock "B" during the period from 6:46 to 7:00 A.M. (R. 1168). Going through at the fastest possible rate, eight minutes would necessarily be consumed in getting the employees through the time clock. The testimony is that in actual practice it took nine or ten minutes for the employees to punch through (R. 1168). We have then a situation where it would necessarily be about four or five minutes to 7:00 before all the employees would even be past the time clock. If two minutes are allowed them to get to the department (R. 174) this would mean that it would be two or three minutes to 7:00 at the very earliest before the employees could reach their department. Of course, it cannot be assumed that employees would get in at top speed every day; and the evidence showed they did not.

b. Preliminary Activities

There was little for the employees to do in the way of preparing themselves for work. They spent some time, according to petitioners' witness Anderson, putting on their aprons or finger cots, or talking (R. 538). Mrs. Socia said that all she had to do was to put on her finger cots and get a brush and a stool (R. 740). We think it must be concluded that the few minutes the employee may have spent in the department before production started were consumed in purely personal activities.

The testimony of Harms, respondent's witness, is convincing that after they arrived in the department and before the regular starting time the men would grease their arms with vaseline and many of them would take

a chew of tobacco; and that most of the employees would put on finger cots, aprons and overalls (R. 1173) and that there was a great deal of talking in the department before starting time (R. 1180); and that the employees often spent time looking for their aprons (if they did not remember just where they left them the night before) and changing their shoes (R. 1181).

The brushers had no preliminary operations except to get their brushes. This might take a few seconds. The dippers did not have anything to do in connection with getting the tubs ready (R. 1178). The spongers had nothing to do except to get a pail of water; and they usually did this after 7:00 o'clock, while the brushers and dippers were getting started, since the spongers could not begin production until the brushers had brushed some ware and the dippers had dipped it (R. 1182).

c. Start of Production

The petitioners from this department offered very little information as to the time when production started. Anderson, for example, said that he could not tell just what he did on any particular day after punching the clock, and that he could do no more than give a guess (R. 550, 539). He said he wouldn't know as to any day when he first started dipping operations (R. 539); and his recollection as to how much time he may have spent walking into the department, and talking with other employees, was extremely vague and inaccurate (R. 534, 539). Finally, he admitted he couldn't tell by looking at the clock card when an employee went to work (R. 533).

Mrs. Socia was likewise vague and most evasive in her estimates as to how much time she may have spent (between punching in and starting work) while walking to her department, talking with other employees, chat-

ting at the locker where the women kept their brushes, looking up her own favorite chair or stool, or putting tape on her fingers (R. 769-775). She could only guess how long it took (R. 775).

Harms, respondent's witness, who had worked along with Anderson as a journeyman dipper for many years (R. 1166, 1187), said that once in a while someone might have a piece or two dipped before the whistle blew, but this was not often; and that it would be his observation that employees did not begin work until the regular starting time (R. 1173). He said that during the period of nine or ten years when he was working as a dipper he was usually the first one to reach the department in the morning and the first one to leave at night. He often punched in at fourteen or thirteen minutes before starting time, but he never started work before starting time (R. 1184).

The brushers would usually visit in the department until starting time and would start work then, except that if the trucker had not brought in their ware they would wait until some had reached them (R. 1181). The dippers started after the brushers (R. 1170). The spongers would wait until the brushers and dippers had got started to work and then they would get their water so as to be ready to start work soon after starting time (R. 1182).

The testimony of Anderson and Mrs. Socia really goes no further than to the point that they punched in each day at the time indicated on the clock card and that they then started to walk toward their department. The Master accepted the testimony of the Company's witnesses that no actual work was done during the period of two or three minutes before starting time during which there was a possibility of some work being done by the hand-operation workers, if their whole crew was there early.

Many detailed instances could be cited to demonstrate the lack of credibility of witnesses Anderson and Socia, who testified on behalf of petitioners as to this department. These two witnesses were among those singled out in the report of the Special Master (R. 180-181), in connection with his discussion of the indefinite and inconsistent nature of the testimony offered on behalf of petitioners. We submit that the determination of the Master as to the credibility of these witnesses must be accepted.

d. Conclusions as to Brushing and Dipping Department

The employees in this department did not make any particular attempt to fix the time when work started. There is no showing that they started work before starting time. On the contrary, it appears that it was physically impossible for employees working on machines to start work before the machines were started at 7:00; or for other employees to start before their crew was assembled, which was usually 7:00 or after. There is certainly no testimony whatever to support any finding that work started at any particular time before 7:00 o'clock and we think the conclusion must be that the employees did not begin work before 7:00, and that they frequently quit early, and that they unquestionably took considerable time off during the day. These, of course, were the conclusions of the Master.

4. GLOST BELT

a. Physical and Mechanical Factors Affecting the Time When Work Began—Group Operations

The glost belt is a large conveyor system. After the ware has been dipped into liquid glaze in the dipping department it is placed on benches in the glost belt system. Girls in the loading stations remove the ware from

the benches and place it in earthen ware containers or saggers of varying shapes and sizes, the typical proportions being approximately 15 x 18 inches in width and breadth and 15 inches deep. The saggers move from the stations on gravity rollers to a moving conveyor belt. When they reach a point toward the kilns, as marked on Exhibit 30-A (R. 973, reproduced at R. 1524), the saggers are removed from the belt by a group of men, and loaded on cars approximately 5 x 7 feet in size. These cars are then moved through the glost kilns by mechanical means. After the firing has been completed the cars emerge from the kilns (about 48 hours after their entry). At this point the glost unloaders and emptiers remove the ware from the saggers and place the empty saggers back on the moving conveyor belt where they are carried along to the stations at which the girls fill the saggers, and at that point other men deflect the saggers from the moving belt to the stations where the girls load them (R. 1095, et seq., R. 1222, et seq.).

Obviously, work could not start in this department until the belt was started; and the testimony as to the time when the glost belt was started in the morning must therefore be examined. As to this, petitioners' witnesses contradicted each other, and the testimony of each was impeached.

Trombley, who testified at length, did not specify when the belt started. He said first that he guessed he usually started work at five or six minutes to 7:00 (R. 458). This was disproved. At another point Trombley stated that the department started at 7:00 (R. 484).

On the other hand, Dacko stated that the belt often started at ten minutes or twelve minutes to 7:00 (R. 904); and Pearl said that he always saw Charles Doll,

Jr., assistant general manager, start the belt at fourteen minutes to 7:00 (R. 1482-84). But it is obvious that the belt couldn't be started for production purposes at twelve or fourteen minutes to 7:00, because nobody would be there. For this reason, as well as for the reason that Pearl was entirely discredited, we think his testimony must be disregarded.

Doll, Jr., and the glost belt foreman denied that Doll, Jr., ordinarily started the belt or that it was started before 7:00 (R. 1228, 1233, 1302, 1472), and Anderson, a petitioner, said he never saw Mr. Doll, Jr., start the belt (R. 1473). Therefore, little importance can be attached to the testimony of Messrs. Pearl and Dacko.

We submit that, considering the contradictory statements of petitioners' witnesses and considering their demonstrated lack of credibility, the testimony of respondent's witnesses should be accepted that the belt was not started for production purposes nor did production start before the regular starting time, which was ordinarily 7:00 A. M. (R. 1472, 1233). Stief, employed in a supervisory capacity, testified without contradiction that he had nothing to do in connection with the glost belt before 7:00 (R. 1311).

The Master did not make a specific finding on the point as to when the belt started (R. 185), but did find that in this department, as in the other departments, production did not regularly start until the regular starting time (R. 191), and pointed out that in this department there were no preliminary activities for the employees to perform (R. 170).

The Master also relied on the fact (R. 184) that rather than the time of starting the belt (which may have been occasionally put into motion before starting time for test purposes to see whether it was in proper working order), it was the time when a full crew was assembled that determined the time when work could start. Work could not start until nearly all of the crew was on hand. This was admitted both by Trombley (R. 441) and by Dacko (R. 927). Further, the glost belt department was operated in conjunction with the chipping department, and neither department could commence operations before the other, or until nearly a full crew was on hand in each department (R. 1231). There is no claim that the chippers were ready to work before 7:00.

Employees on the glost belt and in the chipping room used time clock B, along with the dipping room employees, the maintenance employees and the packing department employees, as has been above described, with the result that at the period from 6:46 to 7:00 there were usually somewhat more than 200 employees punching through this time clock during this particular 14-minute period. They could not even get through the time clock until about four or five minutes to 7:00 at the very earliest. Allowing one or two minutes to walk to the department (R. 452, 905), it is clear that here again the inquiry is limited to the question as to whether or not work started at some time during a period of about two or three minutes prior to 7:00, which is the earliest that it would be physically possible for work to commence, assuming that every employee was on hand early, and that no time at all was lost in getting all the employees into the department.

b. Preliminary Activities

There were no preliminary operations in this department except purely personal activities such as putting on gloves or overalls (R. 170). None of the petitioners claimed that they did any work before production started. The situation was described in some detail by respondent's witness Stief, who said that in cases where employees arrived in the department before 7:00 the older workers would generally go to their stations and sit down to rest until 7:00, or occasionally gather in groups and talk. The younger men would generally go to where there was a group of girls and talk to them until starting time (R. 1303). Doll, Jr., also described this situation, saying the girls loved to talk and were slow about starting work (R. 1223). This was specifically mentioned by the Master as convincing circumstantial evidence that no work was done before the starting time by employees in this department (R. 185).

c. Start of Production

Petitioners' witnesses offered but little testimony as to when work started. There is no proof that it started before the regular starting time. The principal witness for petitioners as to the glost belt, Earl Trombley, stated on direct examination (R. 426) that he could not say whether or not the time clock cards represented the time worked. Then he stated that he punched in at fourteen minutes to 7:00 and went directly to work (R. 426). He later admitted (as his time clock cards demonstrated) that he did not ordinarily punch in so early. On cross-examination, he conceded (R. 453) that other employees might not be ready for work when he arrived in the department, and that he couldn't start work until they all

got there (R. 453, 455). He further admitted that he did not know what time the employees would be ready for work (R 456). He admitted that he couldn't say just when he started work on any day (R. 480, 516). He never timed himself (R. 458). Finally, he said that the department started at 7:00 (R. 484) and that he was not considered late if in the department by 7:00 (R. 180).

Dacko said that it took about a minute or two to go from the time clock to his department, but he did not say when he started work (R. 905) nor did he say he started work immediately on arrival in his department (R. 180). On cross-examination he admitted that he couldn't undertake to fix the time that production started on any day (R. 950) and his recollection as to just what he did after punching the time clock and before starting work was most vague and uncertain (R. 948).

Always bearing in mind the admitted circumstance that production could not begin until nearly the entire crew was there, and bearing in mind the evasiveness of the petitioners on cross-examination, we think there can be no doubt but that the truth was stated by Stief, who said that production work did not start before the regular starting time which was usually 7:00 (R. 1302). This was the finding of the Master (R. 191).

All three of the petitioners' witnesses from this department were shown to have testified falsely. Trombley's testimony originally was that after punching out he would come back to clean up the department (R. 432), but he was forced on cross-examination to admit that he finished the clean-up before punching out (R. 467, 488, 495, 508). The Master referred to the unreliability of his testimony (R. 180). Dacko's testimony as to the language on a certain sign (R. 959) was demonstrated to be

incorrect (See Master's Report, R. 152). Pearl completely destroyed the value of his testimony by stating (R. 1485) that on many occasions in 1939 and 1940 and 1941 his time clock card would be punched out at 3:29 and punched in again at 3:31, and that a half hour was deducted in figuring his time. He was forced to admit on examination of the time clock cards that this had not occurred (R. 1487, 1489). The Master's Report referred to the unreliability of his testimony (R. 182-183).

d. Conclusion as to the Ghost Belt

It is clear that employees in this department could not begin work until the belt was turned on. There were no preliminary operations. It is equally clear that the belt could not be turned on for production until practically a full crew was on hand. There is certainly no showing that work ever started early, or that there were ever enough employees there before 7:00 to permit the beginning of work before starting time.

The Master found (R. 191) that production did not begin before starting time, and pointed out that there were no preliminary operations to be performed before production started (R. 170).

F. ARGUMENT

I. Synopsis of Respondent's Contentions

In the application for certiorari, petitioners suggest two bases for recovery. Their first proposition is that the judgment of the District Court should be reinstated. The second is that they should be granted a more substantial recovery than that permitted by the District Court, i.e., that there should be counted as hours of work all time spent in the plant, as indicated by time clock records. The District Court had disallowed this claim of the petitioners (who were plaintiffs in the District Court) and they did not appeal this adverse holding to the Circuit Court of Appeals. For this reason, we submit, the judgment of the District Court has become *res judicata* as to the issues decided against petitioners, and they cannot now attack the judgment of the District Court with a view to enlarging their rights thereunder. Therefore, we submit that the only issue which this Court should consider is whether the judgment of the Circuit Court of Appeals may be reversed, and the judgment of the District Court reinstated.

Summarizing the arguments developed in the following pages with respect to these claims of the petitioners, we begin with the proposition that the findings of fact by the Special Master were not shown to be in any respect clearly erroneous and were, therefore, under Civil Procedure Rule 53 (e) (2), binding on the District Court. The Circuit Court of Appeals so held.

The first branch of respondent's argument, then, is that petitioners' claims must be dismissed because under these findings it is clear that production work did not start

before starting time and there is no proof as to the amount of time consumed in preliminary activities or as to how much of the time so spent, if any, came before starting time. Even if such preliminary activities should be included in computing working time (which we deny), it would not affect the result.

Only if it can be said that as a matter of law employees must be paid for all time spent in the plant, as indicated by the time clock records, could any recovery be sustained. This brings us to the second main division of respondent's argument. We protest that this issue is not properly before the Court. We deny that there is any basis under the law for requiring employees to be paid for all time spent in the employer's plant, and assert that whether petitioners were at work at all times subsequent to punching the time clocks is a question of fact. We point out that both the Master and District Court decided this factual question contrary to petitioners' claim. The decision below on this factual question (on which both lower courts agreed with the Master) is, we argue, correct, being entirely in accord with prior decisions of this Court and the lower federal courts; and being supported by administrative rulings and interpretations, as well as by the testimony of the witnesses for both parties.

The third main proposition for which we argue is that the Circuit Court of Appeals properly held the judgment of the District Court to be erroneous, not only because (as above noted) it improperly disregarded the Master's findings, but for the further reason that such judgment was based wholly on surmise, speculation, and conjecture. In this connection we point out that the formula on which the District Court based its judgment was not supported by any evidence (but was, rather, inconsistent with

uncontradicted testimony), was arbitrary and unreasonable, and was based on a misunderstanding of the record and on certain assumptions which were in fact and law unjustified.

Our fourth and last main proposition is that the judgment of the Circuit Court of Appeals could properly be affirmed on the basis that the District Court erred in refusing to allow as an off-set against petitioners' claims, sums which had been paid them voluntarily by respondent as extra compensation.

II. The Master's Findings Control as to the Factual Issues and Under These Findings the Complaint Must Be Dismissed

1. THE LEGAL EFFECT OF THE MASTER'S FINDINGS

Rule 53 (e) (2), Federal Rules of Civil Procedure, provides in part: "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."

The Circuit Court of Appeals determined that there was no clear error shown in any of the Master's findings but that, on the contrary, they were supported by substantial evidence. We think there can be no question but that this determination of the Circuit Court of Appeals is clearly correct. Not only is it true that the Master's findings are supported by the overwhelming preponderance of the evidence but, in fact, as we point out *infra*, there is no evidence to support any contrary finding. The scholarly and comprehensive review of the testimony which appears in the Special Master's report abundantly demonstrates how fully these findings of fact of the Master are supported by unimpeached testimony and by much circumstantial evidence.

Indeed, the District Court did not find that there was any clear error in the Master's findings of fact. The District Court did not review the Master's report in the light of this rule, and did not consider the issue as to whether there was any showing that the Master's findings were clearly erroneous. Rather, the theory of the District Court seemed to be that if any testimony could be found to support a conclusion that petitioners started work ahead of the starting time, then the Court could disregard the Master's findings of fact and make some award in favor of the petitioners. See, e.g., R. 1500, 1506. The Court suggested at one point (p. 36, Tr. of April 12, 1943—omitted from printed record and referred to per stipulation, R. 1582) that it might call five or six other employees and interrogate them under oath in order to determine whether or not the Court would sustain exceptions to the Master's report. Surely, this misconceives the function of the District Court in reviewing a case which has been referred to a Master for a finding of facts. The findings of the District Court, then, were not based on its determination that the Master's findings were clearly erroneous.

Rather, the conclusion of the District Court was based on an independent finding which was in fact erroneous and on an assumption which was entirely unjustified. The finding to which we refer (R. 242) was to the effect that most of the employees were in the plant by eight or nine minutes before starting time. As we point out *infra*, this finding was unsupported by the testimony and was based on the Court's misunderstanding of three exhibits. The assumption to which we refer is the District Court's assertion (R. 242, 243) that if the employees were in the plant ahead of time, they must have started work ahead of starting time. This was clearly contrary to the abund-

antly supported finding of the Master (based on the actual testimony) that although many of the employees may have been in the plant somewhat before starting time, yet they did not in fact start work prior to the starting time.

We submit that the Circuit Court of Appeals correctly held that the findings of fact by the Master were supported by substantial evidence, were not shown in any respect to be clearly erroneous, and were binding on the District Court.

While Rule 53 (e) (2) does not appear to have been frequently before this Court, there are many decisions of the Circuit Courts of Appeals, and they are in agreement as to the proper construction and effect of this rule.

In *Santa Cruz Oil Corp. v. Allbright-Nell Co.* (C.C.A. 7, 1940), 115 F. (2d) 604, 607, the Court said that this rule "binds the District Court to accept findings of a Master just as Rule 52 (a) binds this court to accept findings of a District Court," and stated the rule to be that "so far as there is any testimony consistent with the finding, it must be treated as unassailable." In that case the District Court had reversed the findings of a Special Master, and on review the Circuit Court of Appeals concluded that the findings of the Master were supported by the testimony, and that therefore the District Court erred in sustaining exceptions thereto.

In such a case as this the question before the Appellate Court is the same as the question before the District Court. The findings of the Master are to be accepted (disregarding the Trial Court's refusal to accept them) unless it is apparent to the Appellate Court that the Master was clearly in error. *Michelsen v. Penney* (C.C.A. 2, 1943), 135 F. (2d) 409. As declared in *Morris Plan In-*

dustrial Bank v. Henderson (C.C.A. 2d, 1942), 131 F. (2d) 975, 976 (with reference to Bankruptcy General Order 47, which employs the same language as Rule 53 (e) (2)):

> "It is true that logically a distinction can be drawn between holding a referee's finding to be 'clearly erroneous' and holding a judge's finding that a referee's finding is 'clearly erroneous' to be 'clearly erroneous.' • • • We should regret, however, to be compelled now to introduce such refinements into the solution of what is after all only a practical problem. • • • We therefore hold that the question is the same in this court as it was in the District Court."

In accordance with these principles, the Circuit Court of Appeals in the instant case reviewed the evidence and determined that the District Court had erred in failing to accept the Master's findings. The decision was in accordance with well established doctrines, which have been uniformly followed by the Circuit Courts of Appeals under the Federal Rules of Civil Procedure. In *National Labor Relations Board v. Remington Rand, Inc.* (C.C.A. 2, 1942), 130 F. (2d) 919, 930, the Court (applying by analogy the provisions of Rule 53 (e) (2) in a case where a Master had been appointed by the Circuit Court of Appeals) ruled that where there was contradictory testimony, the finding of the Master should be accepted, since the Master had the right to accept the testimony of a witness, and since, where the Master did accept the testimony and made findings of fact accordingly, the Court could not say that such findings were clearly erroneous. Similarly, in *In Re Connecticut Company* (C.C.A. 2, 1939), 107 F. (2d) 734, it was ruled that the Trial Court was in error in refusing to affirm the Master's report where there was testimony to

support it. In *Arrow Distilleries v. Arrow Distilleries* (C.C.A. 7, 1941), 117 F. (2d) 636, it was held that the District Court had erred in rejecting the Master's findings which were supported by substantial evidence.

These principles have been applied in other cases involving employee actions under the Fair Labor Standards Act, with results identical to those reached herein by the Circuit Court of Appeals. In *Bracey v. Luray* (D.C. Md., 1944) (not officially reported), 7 W. H. Rep. 760, 8 Lab. Cas., par. 62,289, the Court declared:

> "The Special Master was in the best position to appraise the credibility of the probative value to be given to the testimony of each and every witness appearing before him. • • • We find, however, that there was substantial evidence to support the Special Master's conclusion in each instance and, therefore, deem it unnecessary to review in any detail his findings of fact and conclusions with respect thereto, except with respect to one point [of law]."

Similarly, in *In Re Interstate Magazine Hauling Corp.*, (D. C. N.Y. 1943), 55 F. Supp. 880, 881, in affirming the referee's order, the Court said:

> "It is apparent from the referee's decision and from his findings of fact that he was convinced that claimant had • • • failed to produce any definite evidence to support or sustain his claim for the alleged overtime. After all, this was a question of fact. I cannot say that in coming to this conclusion the referee was clearly erroneous. The referee was better qualified to pass on the credibility of the witnesses and the value to be attached to their testimony than the reviewing judge. • • •"

While the Federal Rules of Civil Procedure apparently require that more weight must be given to the Master's findings than was true under the provisions of the old Equity Rule 61½ (3 Moore "Federal Practice," 3144), yet the result reached here was in accordance with principles that long antedated the Federal Rules of Civil Procedure (1938). As early as 1895, this Court declared, in *Davis v. Schwartz*, 155 U. S. 631, 637, with respect to a case that had been referred to a Master by consent to find the facts (as was the case here, R. 140), "as there is nothing to show that the findings of fact were unsupported by evidence, we think they must be treated as conclusive." And see *Kowalsky v. American Employers Insurance Company* (C.C.A. 6, 1937) 90 F. (2d) 476; *Roberts v. Southern Surety Company* (C.C.A. 4, 1929), 33 F. (2d) 501.

2. UNDER THE FINDINGS OF FACT BY THE MASTER THE ACTION MUST BE DISMISSED

We have reviewed *supra* (p. 15) in some detail the findings of fact made by the Special Master. There can be no question but that if these findings be taken as the facts of the case, the action must be dismissed. The Master found that production did not start until starting time; that on each day there were many employees who started production after starting time and many who quit work early; that if there were particular occasions when an individual employee started production as much as a minute or possibly two minutes before starting time, any such instances were more than counterbalanced by occasions when such employee would start late and quit early.

Clearly, under these findings, the determination of the District Court, to the effect that an employee would be

presumed to have started production work seven minutes after punching the time clock in the morning and five minutes after punching the time clock in the afternoon, cannot be sustained.

Moreover, the Master made other findings (many of them specifically approved—R. 241-244—and all of them generally adopted by the District Court—R. 272) which dispose of the contention that there were certain preliminary activities of the employees that should be deemed working time and which should be paid for. The Master found, as pointed out more fully *supra*, that it could not be determined upon the proofs as submitted, how much time was spent in these preparatory activities (such as putting on overalls or gloves, adjusting stools, picking up tools, rubbing vaseline on one's arms, etc.) or how much of the time so spent occurred before the regular starting time. On any particular day there would be some employees engaging in these activities before starting time and others doing this after starting time. For any particular employee, the situation would vary from day to day.

All of these findings are not challenged nor on this record can they be.

Therefore, the question as to whether or not any of these activities comprised "work" within the meaning of the statute, and whether the time so spent should be included as "working time" need not be reached because even if it should be held that any part of such activities constituted work, still no judgment could be entered on the basis of such a determination because of the utter impossibility of determining how much time might have been spent by any particular employee in such activities, and whether the time so spent was before or after start-

ing time, and whether, if before starting time, it was compensated for by other occasions during the week when the employee started late or quit early.

III. Judgment Cannot Properly Be Rendered for Petitioners on the Grounds that They Must Be Paid for All Time Spent Within the Plant as Indicated by the Time Clock Cards

1. THIS CLAIM CANNOT BE HERE ASSERTED

This contention of the petitioners received short shrift in the District Court. The Master ruled that on the basis of the particular facts here involved working time did not begin when the employee punched the time clock (R. 199); the District Court specifically confirmed this finding of fact (R. 244). On this point, the judgment of the District Court was adverse to the petitioners. Petitioners did not, however, file any appeal or cross-appeal to the Circuit Court of Appeals. Accordingly, the judgment of the District Court on this point became *res judicata*, and the petitioners could not attack the District Court's judgment in the Circuit Court of Appeals, with a view to enlarging their own rights thereunder.

Peoria & Pekin Union Railway Co. v. United States, et al., 263 U.S. 528, 536 (1923);

Alexander, Collector v. Cosden Pipe Line Co., 290 U.S. 484, 487 (1933);

Helvering, Commissioner v. Pfeiffer, 302 U.S. 247, 250 (1937);

Morley Construction Company v. Maryland Casualty Co., 300 U.S. 185, 191 (1937);

LeTulle v. Scofield, Collector, 308 U.S. 415, 421 (1940); and other cases there cited.

Many decisions of the lower Federal courts to this same effect are collected in 10 Cyc. of Federal Procedure (2d Ed. 1943), pp. 68, 498.

This question, then, as to paying employees from the moment they punched the time clock, was not presented to the Circuit Court of Appeals. The issue not having been before the Circuit Court of Appeals, it cannot be raised here.

Husty v. United States, 282 U.S. 694, 702 (1931);

Virtue v. Creamery Package Manufacturing Company, 227 U.S. 8, 38 (1913);

Edward Hines Yellow Pine Trustees v. Martin, et al., 268 U.S. 458, 465 (1925);

Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U.S. 341, 344 (1920);

Illinois Central Railroad Co. v. Mulberry Hill Coal Co., 238 U.S. 275, 281 (1915).

Other cases on this point are collected in 12 Cyc. of Federal Procedure (2d Ed., 1943), p. 344.

Many sound practical reasons support the rule so established by a long line of precedents. A contrary rule would impose unfair burdens, both on this Court and on the several Circuit Courts of Appeal. A contrary rule, permitting questions to be raised for the first time in this Court, would require this Court unnecessarily to assume a heavy burden (which under the law is divided among the several Circuit Courts) of examining complex factual details of many voluminous records. Such a rule would put the Circuit Courts of Appeal in the unenviable position of being compelled to render judgments without

consideration of points (not considered because not raised) which might be determinative of the case. Any rule which permitted litigants to raise for the first time in this Court a point decided adversely to them in the District Court and not presented to the Circuit Court of Appeals, would unsettle the finality of judgments of the lower courts, would be productive of much confusion, would encourage the taking of appeals piecemeal, and would increase unnecessarily the burdens of the Supreme Court.

2. WHETHER EMPLOYEES WERE AT WORK AT ALL TIMES SUBSEQUENT TO PUNCHING TIME CLOCK IS A QUESTION OF FACT

It is obvious that whether or not an employee is "at work" immediately upon punching the time clock depends on what activities he engages in after punching the clock. In some plants, employees punch in as much as a half hour early and spend the time reading a newspaper or playing cards while waiting for work to start (R. 1243). Conceivably—although there is no proof of this in the record—employees in some plants might be required to begin oiling machinery or sweeping floors, or to perform some other task, immediately after punching the time clock. In any case, determination as to whether an employee's time after punching the clock is spent at work or otherwise, must depend upon an appraisal of the facts of the particular situation.

In other words, determination of precisely what time is included within the phraseology "hours worked" and "workweek" is primarily a question of fact. That this is true has been recognized in several decisions of this Court. In *Armour & Co. v. Wantock, et al.*, 323 U.S. 126 (1944) it appeared that the lower courts, in deciding

whether or not time on duty by company fire guards was compensable as time worked, had "weighed the evidence in the particular case in the light of the Administrator's ruling and reached a result consistent therewith" (this language being taken from the opinion of the Court in *Skidmore, et al., v. Swift & Co.*, 323 U.S. 134, 140). The factual finding that under the circumstances there involved time spent on duty constituted working time was upheld. In a companion case, *Skidmore, et al., v. Swift & Co.*, 323 U.S. 134 (1944), the lower court held that as a matter of law, time spent by guards in such activities could not constitute hours worked. The Supreme Court observed that it was error to determine the issue as one of law and, in remanding the case for further proceedings, said, p. 136:

> "We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 572. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct; consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances."

The decision of the Fifth Circuit Court of Appeals in *Tennessee Coal, Iron & Railroad Company, et al., v. Muscoda Local 123, et al.*, (C.C.A. 5, 1943), 135 F. (2d) 320 (subsequently affirmed by this Court, 321 U.S. 590), was placed squarely on the proposition that the determination as to whether the working time of the miners

began when they entered the mines' portals, was a question of fact. This is referred to in the original opinion of the Court, 135 F. (2d) 320, 322, and is emphasized in the opinion handed down on the motion for re-hearing, 137 F. (2d) 176, 183, where the Court ruled that the question before it on appeal was whether or not the findings of fact by the District Court were clearly erroneous; and the Court emphasized that its opinion should not be interpreted as providing a rigid definition of working time or as upholding the "portal-to-portal" theory as a matter of law. When this case reached the Supreme Court it was pointed out (321 U.S. 590, 593) that the decision of the Circuit Court of Appeals was based on the proposition that the District Court's findings were supported by substantial evidence. This Court agreed, and declared (321 U.S. 590, 598):

> "Viewing the facts of this case as found by both courts below in the light of the foregoing considerations, we are unwilling to conclude that the underground travel in petitioners' iron ore mines cannot be construed as work or employment within the meaning of the Act."

The concurring opinions of Mr. Justice Frankfurter and Mr. Justice Jackson particularly emphasized that the question was one of fact.

In the instant case, the question as to when working time began was treated as a question of fact (R. 399). Both the Special Master and the District Court found as a fact that work did not begin the moment employees punched the time clock. The Circuit Court of Appeals was not asked to review this finding but its opinion suggests its approval of this factual determination made below. We have here then concurrent findings that in

the particular situation here involved, employees did not begin work the moment they punched the time clock, and that the workweek may not be computed on such a basis.

3. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN ANY WAY IN CONFLICT WITH THE RULE OF THE "PORTAL-TO-PORTAL" CASES

Petitioners insist that support for their position is to be found in the decisions of this Court in *Tennessee Coal Company, et al., v. Muscoda Local,* 321 U.S. 590, and in *Jewell Ridge Coal Corporation v. Local No. 6167, et al.,* 325 U.S. 161 (1945). This argument is easily answered. Examination of the facts of these two cases shows that rather than upholding petitioners' argument they support the proposition that the mere presence of the employee on the employer's premises does not mean that he is at work.

As appears from the files and records of *Tennessee Coal Company v. Muscoda Local,* one of the claims of the employees in that case was that they should be paid "for the aggregate of time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out" (40 F. Supp. 4, 8 and 9). Examination of the record and briefs filed in that case discloses in more detail the precise nature of the claims so made.

The miners spent from thirty to forty-five minutes on the employer's premises before entering the portal of the mine. The employees, after reaching the company's property, usually went first to the bathhouse, where they changed to their work clothes, leaving their street clothes in lockers or hangers provided for this purpose. (It was the original position of some of the employees in that case that "the work day began and ended at the bath-

house, but this claim was abandoned.) After changing their clothes in the bathhouse, the employees went to a small house at or near the tipple of the mine where they purchased at cost carbide for use in their lamps (Circuit Court of Appeal Record in *Tennessee Coal & Iron* case, Vol. 2, pp. 779-80, 1085, 1156-7). The employees, after securing carbide, if any was needed that particular day, next deposited their checks at the tipple office. This mine check was a metal disc bearing a number. The check when deposited was hung on a hook on a board which represented the various working places. Much of the testimony of the employees in that case was devoted to the claim that they had to spend some ten minutes to a half hour on the surface collecting tools, receiving orders and performing the incidental duties necessary to enable them to do their work in the mines.

The District Court held that the aggregate of the time so spent on the surface in obtaining and returning lamps, carbide and tools and in checking in and out, constituted working time.

The Circuit Court of Appeals, however, reversed the determination of the District Court on this point and held:

> "With respect to time spent by employees checking in and out and procuring and returning tools, lamps, and carbide, the case stands differently. It appears that the workers were obliged to furnish their own tools, lamps, and carbide, and were free to exercise their own judgment as to when, where, and how they should procure their equipment. The company merely instructed them as to the equipment needed, and did not attempt further to regulate the matter. The checking system used by appellants required the employees only to deposit a metal disc at the tally house when arriving for

> work, and to pick it up again at the end of the shift. In addition to the practical difficulties incident to the computation of isolated moments so elusive in character, we think these pursuits should not be computed as work-time; since they fall within the category of duties incident to qualifying the employee to perform his work rather than within the scope of his actual employment." 135 F. (2d) 320, 323.

Again in its decision on the application for re-hearing, 137 F. (2d) 176, 180, the Court reiterated its holding that no part of the time spent in going to and from the bathhouse, or in the batlihouse, or in going to and from the portal was working time, but that the employment began at the time the employees were required to report, and did report, at the portal, and ended upon their return thereto; and that if employees were not required to report at the portal at any particular time, then the hours of work would begin at the actual time of departure on the trip underground.

At the Tennessee iron mine, then, the company required the employees to report at the portal at a specified time. The only comparable requirement of the Mt. Clemens Pottery Company was that the employee should punch the time clock by starting time. If an employee arrived at the Pottery plant earlier and punched the time clock earlier, this was a matter of his own convenience, just as if a mine employee arrived at the portal before the time he was required to be there. The mine employees were not allowed compensation for the few minutes that they might have spent at the portal if they arrived there before the required time. Nor did they in this Court make any claim for such time. Furthermore, the holding of the Circuit Court of Appeals (not reviewed by this Court)

was that no compensation should be allowed the miners for time spent at the surface and before reporting at the portal (or after leaving the portal at the close of work) as above described.

Therefore, the decision of the Circuit Court of Appeals in the *Tennessee Coal & Iron* case requires the dismissal of petitioners' claims herein. This was recognized and pointed out by the District Court herein in its opinion (R. 244). Subsequently, the District Court was asked by petitioners to amend its findings and require pay for all time spent on the premises (R. 293). But the Court ruled that the "portal-to-portal" cases could not be so construed (R. 1513). Similarly, the Circuit Court of Appeals, in its opinion herein, pointed out that its opinion was in accordance with the decision in the *Tennessee Coal & Iron* case (R. 1596, 1597).

The situation was quite similar in *Jewell Ridge Coal Corporation v. Local No. 6167, et al.*, 325 U. S. 161 (1945). There, again, the claim originally made on behalf of the employees was that the workweek included all the time spent in obtaining lamps, tools, or equipment, and other preparatory activities, as well as the travel time which commenced after they entered the portal of the mine (53 F. Supp. 935, 946).[2]

[2] It is interesting to note that in the *Jewell Ridge Coal* case, which was tried in 1943, the employees by their pleadings disclaimed any additional compensation for the period from October, 1938 (the effective date of the law) to April 1, 1943 (the date of the expiration of a contract). The Circuit Court of Appeals emphasized the fact that this waiver had been made (145 F. (2d) 10, 13).

It appeared in the coal mine case, as in the iron ore case, that the miners spent a certain amount of time on the employer's premises before entering the portal of the

mine. These activities are referred to in the opinion of the District Court (53 F. Supp. 935, 938), where it is pointed out that upon arrival at the mines each underground worker first obtained his lamp from the company's lamp house near the portal, and that after securing their lamps various employees did various things before entering the portal of the mine, and that these preliminary activities required from three to ten minutes. The amount of time so spent varied, of course, with different employees and on different days. (Record of the District Court in that case, pp. 653, 668, 670).

The District Court held, in accordance with the decision of the Fifth Circuit Court of Appeals in *Tennessee Coal, Iron & Ore Company, supra,* that the time spent on the surface, consuming from three to ten minutes, was not a part of the workweek. This holding was not reviewed by the Circuit Court of Appeals, whose opinion related only to time spent in travel after entering the portal of the mine (145 F. (2d) 10). Similarly, the opinion of the Supreme Court pointed out that only the travel time issue was involved (325 U. S. 161, 163).

This case then adds nothing to the decision in the *Tennessee Coal* case.

There is nothing in either of these two cases which is in any way inconsistent with the decision of the Circuit Court of Appeals herein.

4. ADMINISTRATIVE RULINGS OF WAGE AND HOUR DIVISION ARE IN ACCORDANCE WITH THE RESULT REACHED BY THE CIRCUIT COURT OF APPEALS

The Wage and Hour and Public Contracts Divisions of the United States Department of Labor, which function under a single administrator in enforcing the wage and

hour provisions both of the Fair Labor Standards Act (Act of June 25, 1938, 52 Stat. 1060, 29 U.S.C.A. Sec. 201-219) and of the Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036, 41 U.S.C.A. Secs. 35-46), have never undertaken to frame any rigid definition of the phrase "hours worked" as used in these related statutes. On the contrary, the administrative authorities have always treated it as a question of fact depending on all the circumstances of the particular case, and have recognized that under such facts as are here involved, employees may not properly be deemed to be "at work" the minute they punch the time clock.

In Paragraph 2 of Interpretative Bulletin No. 13 (1944-45 W. H. Man. 173, 2 C.C.H. Lab. Law Serv., par. 32,113), the Division states that, as a general rule, hours worked will include (1) all time during which an employee is required to be on duty, or to be on the employer's premises, or to be at a prescribed workplace (and here the proofs showed that the employees were not required to report on the employer's premises or to go on duty or to be at their prescribed working places before starting time); (2) all time during which an employee is suffered or permitted to work, whether or not he is required to do so (and in this case the employees had been instructed not to start work before starting time, and were not allowed to do so, R. 811, 1126, 1018).

Many of the administrative rulings relate to the use of time clocks. It is noted in paragraph 3 of Interpretative Bulletin 13 (1944-1945 W. H. Man. 173, 2 C.C.H. Lab. Law Serv. par. 32,113) that time clocks are an appropriate basis for recording hours worked only when they accurately reflect the period worked by the employee. This might be the case where an employee punches a time

clock on starting each new job during the day. But in a case like the present one, the administrative rulings recognize, the time clock cards do not accurately reflect the period worked.

Thus, the Administrator has instructed his field agents as follows in Inspection Field Letter No. 27 (Exhibit 113, R. 1471, reproduced at R. 1580), which provides in part:

> "SUBJECT: TIME SPENT IN ESTABLISHMENTS BEFORE OR AFTER REGULAR WORKING HOURS
>
> "1. Where employees enter their places of employment a short period of time (15 or 20 minutes) before the regular starting time and do so solely for their own convenience, and not because they are required or expected to do so by the employer, such periods shall not be considered time worked if the employees do not actually perform any work during the period.
>
> "2. Similarly, where employees remain at their places of employment for short periods (15 or 20 minutes) at the end of the day solely for their own convenience and not because they are required or expected to do so by the employer, such periods shall not be considered working time if the employees do not actually perform any work during the period."

In many other releases the Wage and Hour Division has recognized that time clocks are not normally an accurate record of hours worked. Some time ago, the Wage and Hour Division was asked for its advice as to the proper computation of working time where the employees rang in twenty minutes before their established starting time. In answering this inquiry the Regional Attorney for the Wage and Hour Division said (1944-45 Wage Hour Manual, 234):

"The Administrator realizes that a certain amount of latitude must be allowed employers where time clocks are used for recording hours worked. This is especially true in large plants, where thousands of employees must punch in and out at about the same time. A time clock is but one evidence of hours worked by employees. Employers may at the same time keep a record of the actual time worked by employees. If these records are kept in good faith by the employer and it is apparent to the inspector representing the Administrator that the disparity between the time shown by the time clock and the other payroll records is due to factors mentioned in the question, the payroll records will be given greater weight in determining hours worked."

The "factors mentioned in the question" were that a lapse of 15 to 25 minutes between the time an employee punched in and his regular starting time represents "the time between" the time clock and the job; and that an employee "might punch in at 7:40 but actually not start work until 8:00."

Similarly, in interpreting the related Wash-Healey Public Contracts Act (administered by the same Division of the Department of Labor) the Administrator held that a finding of overtime, based upon the punch-in time, was incorrect because it reflected more time than was actually worked. *In Re Conro Manufacturing Co. Inc.*, 5 W. H. Rep. 452, 464 (1942).

On another occasion, (5 W. H. Rep. 148) the Administrator was asked the following question:

"*Question*: At the present time our plant is engaged in production to fulfill a Government contract. To assist in keeping accurate records of the time worked by our employees, we have installed a time clock. As the employees do not punch out for

some time after they actually stop working on the machines, it has been our practice to deduct from the number of hours shown on the time card the amount of time elapsing between actual quitting time and the time the employees punch out. * * * Do these practices conform to the requirements of the Public Contracts Act?"

This question he answered as follows:

"*Answer* : Unless time-card records show the actual time that employees work, such records do not meet the requirements of the Regulations prescribed by the Secretary of Labor under the Public Contracts Act. As to recorded time, the Department makes allowances for a reasonable period of time to cover the period between the time an employee ceases work and the time he punches out on his card. However, a period in excess of fifteen minutes is regarded as unreasonable."

Again, the question was asked (1944-45 Wage Hour Manual, 1193):

"*Question*: Our time keeping office is some distance from the actual location of the work, so that it is necessary for a man to punch his card a few minutes before the starting of his shift in order that he will be at his place of work on time. Employees are paid, however, only from the time the shift begins until the shift is over. Is this permissible under the Walsh-Healey Act?

"*Answer* (Public Contracts Administrator): Under the facts you have given in this connection the Department will not question any reasonable time allowance to permit an employee to go from the time-keeping office to his place of work. The period of from five to ten minutes, as referred to in your letter, would not be regarded as working time under the Act."

In addition to the foregoing administrative rulings, which are precisely in point, other rulings could be cited which reveal administrative recognition of the fact that not all time spent on an employer's premises is working time: Thus in Release 1448 (2 C.C.H. Lab. Law Serv., par. 24,501.415, 1941) it was said that time spent traveling from fences, walls, or other anti-sabotage barriers to working places would not be considered to be working time. In Release 1739 (C.C.H. Lab. Law Serv., par. 24,501.103, 1942) it was ruled that clothes are changed on the employee's own time when he is free to wear his work clothes home.

In various other connections the Wage and Hour Division has recognized that what is working time is a question of fact (see, e.g., Release 1794 (1942) C.C.H. Labor Law Service par. 24,501.635, 5 W. H. Rep. 313; par. 14 of Interpretative Bulletin No. 13, 2 C.C.H. Lab. Law Serv., par. 32,113) and that in making this factual determination it is proper to examine the custom of the industry and the understanding of the parties. This is done not on the basis that custom or agreement can prevail against the requirements of the law; but rather on the basis that custom and the common understanding throw some light on the factual problem which is posed. Release 928 (1940) (2 C.C.H. Lab. Law Serv., par. 24,501.11); Release 1792 (1944-45 W. H. Man. p. 191). C.f., *Tennessee Coal Co. v. Muscoda Local et al.*, 321 U.S. 590, 603, recognizing the importance of custom in borderline cases or where precise computation is difficult or impossible.

In the instant case the custom and practice of the employer in making the computation of hours worked was in accordance with the method followed at substantially, if not absolutely, all other plants (R. 1237, 1340, 1459-61); and this practice was well known to the em-

ployees and was acceptable to them (R. 190, 191). Although the employees felt free to complain and did from time to time make complaints about wages and other working conditions, they never objected that they had worked longer hours than the Company's computations showed (R. 191). One of petitioners' witnesses, indeed, when shown the Company's computation and asked what that represented, replied that that was the hours which the witness had worked (R. 862). Another witness testified that it had never occurred to him before the suit was started that he had worked longer hours than the Company gave him credit for (R. 651).

This common understanding and agreement should be given appropriate effect. To do so would be in accordance with administrative rulings under this law, and with administrative rulings under other related laws. See 26 Opin. Att'y Gen.. 64 (1906), suggesting that hours of labor under the Eight Hour Law (Act of August 1, 1892, 27 Stat. 340) meant "eight hours of effective labor"; 9 Dec. of Comptroller General, 200 (1929).

5. THE FACTUAL DETERMINATION OF THE LOWER COURTS, THAT WORKING TIME DID NOT BEGIN WHEN EMPLOYEES PUNCHED THE TIME CLOCK, WAS CORRECT

It is the position of respondent that this question is not properly before the Court and should not be considered, both because of the usual rule that this Court will not review the concurrent findings of the lower courts, and also because of the fact that petitioners did not appeal from the adverse judgment of the District Court on this point.

But, in any event, we submit that it is clear on the record that the factual determination of the lower courts on this point was correct.

a. Findings Restated

We do not have to face the question as to what character is to be ascribed to preliminary activities which relate to getting ready for work. While under the decisions in the so-called "portal-to-portal" cases such activities are to be excluded from working time, yet the Master in this case was not required to pass upon this precise question because here there was no proof as to how much time was spent in such preliminary activities or whether the time so spent occurred before or after starting time. This finding of the Master was accepted by the District Court whose judgment was predicated on the conclusion that allowance of one or two minutes was ample to cover time spent in going to the department and completing all preliminary activities, which time was not deemed working time (R. 242-244). The conclusion of the District Court was that some employees must have begun actual work before starting time. It was only for such actual work that he sought to compensate them and not for the so-called "preliminary activities."

Likewise, the District Court found no error in the finding of the Master that the time spent walking along the aisles of the plant was not working time, and that the employees were not required to come in early enough to have waiting time, and that on occasions when an employee did arrive early, he was free to spend the time on his own behalf (R. 199).

The Circuit Court of Appeals accepted these findings.

It is these concurrent findings that petitioners attack.

b. As to Indicia of Work as Described by Supreme Court

Petitioners suggest that their activities after punching the time clock, in walking through the plant and waiting for their fellow workers, bear all of the indicia of work as listed by this Court in *Tennessee Coal, Iron & Railroad Company v. Muscoda Local No. 123, et al.*, 321 U.S. 590, and *Jewell Ridge Coal Corporation v. Local No. 6167*, 325 U.S. 161. We think, however, that tested by such criteria these activities may not be described as work.

i. Exertion

The first element to be considered under the test laid down by this Court is the presence of "physical or mental exertion (whether burdensome or not)." From a purely physiological viewpoint, a certain amount of exertion is doubtless involved in walking from the clock to the working place. The same would be true of the activities of two early arrivals who talked over yesterday's ball game while waiting for fellow workers to appear so that work could commence. But if this makes the time so spent a part of hours worked then by the same token an employee is entitled to be paid for time spent coming from his home to the factory. The test may not be applied so as to prove too much. There must be some starting point selected to determine when work begins. It could conceivably be put at the point where the insistent clamor of an alarm clock arouses the sleepy employee from his pleasant slumbers and he is compelled to make the effort of throwing back the covers, chasing off the last cobwebs of sleep and hoisting himself out of bed to face the hard reality of another day of work. It may perhaps be conceded that for some employees, at least, this is perhaps the hardest single effort of the entire day. But there has

not yet been heard a claim that hours of work begin at that point. The starting point must be fixed at that time when the employee commences those energy-expending activities which bear some immediate and appropriate relationship to the employee's actual job. In the case of the coal and iron mines, the journey down the shaft was uncomfortable, dangerous and perilous. The employees were required to proceed through dark and dangerous tunnels, often so low as to force them to crouch. Constant vigil against the perils of live electric wires and obstructions under foot was involved. The trip down the shaft did require substantial physical and mental exertion, in a degree comparable to that expended in actual work. But in this case there is no change in the character of the travel as the employee walks along the street, approaches the plant, and then passes the main gate, and then enters the building, and then passes the time clock, and finally arrives at the particular portion of the plant where he is to begin work.

ii. Exertion Controlled or Required by the Employer

In this case there is found no control or direction by the employer with respect to the employees' activities in walking to their respective departments and waiting for work to begin. It does not appear here, as in the mine cases, that the employees report at any "portal" or gate at a particular time, nor does it appear here, as it did in the mine cases, that company foremen rode on each "mine trip" accompanying the miners down the shaft and sometimes giving work instructions during the journey, and compelling compliance with numerous safety rules. In the mine cases, the employer organized, operated and supervised all the trips. Definite schedules were arranged. In this case, on the contrary, it was

established that employees were not required to report at any particular time nor were their activities after punching in and before starting actual work controlled by the Company. They were free to take such course through the plant as they might desire. They were free to stop off at any portion of the plant to converse with other employees. They were free to walk over to the Company's store to make purchases. Here the exertion was not controlled or required by the employer.

iii. Exertion Pursued Necessarily and Primarily for the Benefit of the Employer and His Business

Here again we face the necessity of establishing some suitable point to differentiate between those activities which are to be done on the employer's time (and included in the computation of hours worked during the workweek) and those which in the parlance of the shop are done "on the employee's own time." The trip from house to factory is necessary to enable the employee to start work, and its primary purpose is to bring the employee to his machine so that production may go on and the employer's business benefit. But it is not suggested that working time should start when the employee leaves his home. This point is too far removed from the beginning of actual work. In the so-called "portal-to-portal" cases in the lower courts (the decisions on this point not having been reviewed by the Supreme Court) employees variously argued that the point where working time begins should be fixed at (1) the point where the employees reached the employer's premises and enter the bathhouse to change clothes; (2) the point where the employees emerge from the bathhouse and occupy themselves with collecting tools, checking in, and killing time before reporting at the portal to start work; (3) the

point where employees actually report at the portal. The decision of the Fifth Circuit Court of Appeals in the *Tennessee Coal, Iron & Railroad Company* case, 135 F. (2d) 320, and the decisions of the District Courts in *Jewell Ridge Coal Corporation v. Local 6167*, 53 F. Supp. 935, and *Sunshine Mining Co. v. Carver* (D.C. Idaho, 1941), 41 F. Supp. 60, all agreed that the point at which working time begins was not reached until the employees entered the portal of the mine. Their mere presence on the employer's premises waiting for work to begin and perhaps spending isolated elusive moments in picking up tools, obtaining supplies, and making ready to go down the shaft was not to be included as work.

The time which the miners spent in such activities, like the time spent by petitioners after punching the time clocks and before starting work, was consumed primarily for the convenience of the employee. The precepts of many generations have bred in most workingmen a reluctance to be late. It is not easy to so arrange the trip from home to factory as to be sure of arriving at the latter destination precisely at starting time. It is more convenient to allow some leeway so that if all goes well the worker will arrive at the plant a little early. The employer, to be sure, could insist that the employees wait outside the plant until the whistle blows, but it is more convenient for the employees if they are permitted to come in, ring the time clock so as to register their attendance, and then spend their time as they please until starting time.

c. The Decision Below Accords With Common Understanding of the Meaning of the Term "Hours Worked" as Reflected by Court Decisions and the Testimony of Witnesses

To correlate time spent by factory employees walking along the clean, painted concrete floors of an attractive factory building, brightly illuminated and well ventilated, with time spent by miners in their molelike progress through the shafts of a mine, is to overlook fundamental factual differences.

These differences were noted by the Supreme Court in the *Jewell Ridge Corporation* case *supra*, where it was pointed out (325 U. S. 161, 666):

> "Those who are forced to travel in underground mines in order to earn their livelihood are unlike the ordinary traveler or the ordinary workman on his way to work. They must journey beneath the crust of the earth, far removed from the fresh and open air and from the beneficial rays of the sun. A heavy toll is exacted from those whose lot it is to ride and walk and mine beneath the surface."

This distinction was relied on by the Minnesota Court, in holding that not all time spent by lumber camp cooks on the employer's premises constituted working time (*Bicanic et al., v. J. C. Campbell Co.* (Minn., 1945) 19 N.W. (2d) 7, 8 W.H. Rep. 589); and by the United States District Court in Oregon, which refused to hold that travel time in lumber camps must be counted as hours of work. *Walling v. Smith Wood Products, Inc.* (D.C. Ore. 1945) 8 W.H. Rep. 796, 10 Lab. Cas. par. 62,743.

In factual situations analogous to those here involved, the lower courts have quite uniformly found that such travel time is not a part of hours worked. While they

are lower court decisions, their number and their uniform trend is, we think, persuasive.

In *Bulot v. Freeport Sulphur Company* (D.C. La. 1942) 45 F. Supp. 380, the claim of the plaintiffs was that their hours of work included time spent on company motor boats traveling from the mainland to an island where they worked in a sulphur mine, and included also time spent on the employer's premises after getting off the boat in the morning before the commencement of the daily work schedule, or while waiting for the boat after work; but the Court found on the facts that such time was not working time.

In *Gordon v. Paducah Ice Mfg. Company* (D.C. Ky. 1941), 41 F. Supp. 980, it appeared that employees who were engaged in packing ice into railroad refrigerator cars frequently waited intervals ranging from fifteen minutes to two hours after completing one car and while waiting for another car to come in. They frequently spent the time waiting on the employer's premises. The Court found that this waiting time was not working time.

In *Hanzely v. Hooven Letters, Inc.* (N.Y. City Court, 1943), 6 W.H. Rep. 966, it was held that time spent by a piece rate worker waiting for work to come in was not working time where the employer did not require him to wait and he spent his time as he pleased.

In *Thompson v. Daugherty* (D.C. Md. 1941), 40 F. Supp. 279, it was held that time spent by a mail truck driver waiting for his load of mail should not be included in his hours of work.

In *Jackson v. Mid-Continent Petroleum Corp.* (D.C. Okl. 1942) (not officially reported), 2 W.H. Cas. 540, the same ruling was made as to time spent by a truck driver at an employer's warehouse waiting for orders to work.

In *Dollar v. Caddo River Lumber Company* (D.C. Ark., 1941), 43 F. Supp. 822, it was held that time spent by an employee on his way to a lumber camp in a conveyance furnished by the employer should not be counted as work. The same is true of time spent returning from work, even though the employee at the end of the day may find himself 50 or 60 miles further away from home than at the beginning of the day. *Walling v. Mid-Continent Pipe Line Co.* (C.C.A. 10, 1944), 143 F. (2d) 308.

In *Southern Railway v. Black* (C.C.A. 4, 1942), 127 F. (2d) 280, the claim of the redcaps that they worked twelve hours a day was rejected, the Court pointing out that they were actually required to be on duty only for periods of about a half hour at a time when trains were coming into the station or leaving and that at other times the employees were at liberty to leave the station and frequently did so.

In *Cordell v. H. F. Wilcox Oil & Gas Company* (D.C. Okla. 1941) (not officially reported), 4 WHR 606, 5 Lab. Cas. par. 60,807, the Court found that an individual employed as a pumper on oil leases, who was required to be available during long periods of time in the event something should develop that would require his attention, such as repairing a pump, should not be deemed to be at work during the entire time spent on the premises.

In *Walling v. Peavy-Wilson Lumber Company* (D.C. La. 1943), 49 F. Supp. 846, it was held that travel time between a lumber "village" and the site in the woods where the actual cutting was done should not be included as working time. There apparently all of the travel was done on the employer's premises and in vehicles furnished by the employer. This case is of additional interest because it appears that the employees there claimed

compensation not only for time spent riding in company vehicles to the place of work but also made a claim for walking time consumed by some of the laborers between the time they got off the work train and the time they reached the actual point where they worked. In decreeing that this should not be considered work time, the Court pointed out that the time involved was so short that the issue was insignificant.

In *S. H. Robinson and Company, Inc., v. LaRue* (Tenn. 1941), 25 Tenn. App. 284, 156 S.W. (2d) 359, affirmed, 178 Tenn. 197, 156 S.W. (2d) 432, it was held that the hours of work of a watchman should be limited to those hours for which his services as a watchman were needed, and that he would not be permitted to build up a large claim for damages by secretly extending his hours, remaining on the premises for the ostensible purpose of watching them during periods when the employer did not need or require his presence.

Even under statutes such as workman's compensation acts which use broad phraseology in referring to injuries occurring within "hours of employment" or "in the course of employment," it has been frequently recognized that the mere presence of the employee on his employer's premises, while he is waiting or casually spending the time, should not be included as falling within his hours of employment. For example, in *Guastelo v. Michigan Central Railroad Company*, 194 Mich. 382 (1916), it appeared that plaintiff was employed in connection with repairing the railroad company's tracks, and that he lived in a bunk car furnished by the employer. He quit work one day at about 5:30 o'clock, and then put coal in an engine, changed his clothes and "hung around" until 6:00 o'clock, when he started to walk along the tracks toward his bunk car. He was hit by a train. In holding that he

was at such time not in the course of his employment, the Court said of the group of employees of which plaintiff was a member:

> "The only requirement of their hiring was that they work during working hours. Their time and pay started when they started work and stopped when they quit at quitting time. * * * he was through for the day and had earned his day's pay, his employer had no demand upon him or need of him, he owed it no duty, and was then master of his own time and movements until he should return at the appointed time the following morning to commence another day's work, when his pay would again start. * * * At the conclusion of his day's work he could go when and as he chose. He did not choose to leave for nearly half an hour . . ."

These decisions reflect the common understanding of working men and their employers as to when work begins. This common understanding must be considered in construing the Act. The phrases employed are not words of art. They derive their significance from that which they have developed in the everyday terminology of the working world. Recognizing this, Congress did not undertake to define the meaning of "hours worked" nor the meaning of "regular rate of pay." Undoubtedly, the reason for this, as pointed out by the Supreme Court in *Walling v. A. H. Belo Corp.*, 316 U.S. 624, 635 (1942) was that it was impracticable to do so in view of the fact that the employment relationships to which the Act applies are so various and unpredictable. The phrase was taken from the language used by practical men in their daily affairs and should be so understood.

One of the practical realities of operating a factory is that it is impossible for a group of one thousand or

more individuals to arrive at their places of work simultaneously. In respondent's plant it took a minimum of twelve to fifteen minutes to get the workers into the plant. In larger plants it takes about thirty minutes. It is in recognition of this plain fact that all plants have developed a custom of opening their doors and permitting employees to enter fifteen or thirty minutes before starting time.

The objective is to have everyone in the plant ready to go to work at starting time. To do this the individuals who lead the parade must enter the plant earlier than others. Some employees come in early one day; others will come in first another day. As they pass the time clock they register their presence in the plant for the day, the time clock being used primarily as an attendance record. As stated by petitioners' expert witness, the time of punching the time clock bears no direct relationship to the time of starting work (R. 1460). It has always been understood by employers and by unions representing the employees that hours of work begin at the time when the employee is required to be at his machine ready to go to work. This is reflected in countless collective agreements and shop rules (Exhibits 66-73, 92 (R. 965, 1350, 1463, 1473; reproduced at R. 1537-1542, 1549) and is in fact so commonly understood that in many collective agreements the matter is not specifically mentioned, it being understood that hours of work are so computed unless some contrary method is specifically agreed upon (R. 1349 *et. seq.*).

Any requirement that an employee must be paid for the time spent getting into the plant would be directly at odds with the practice which has prevailed in plants all over the country for many years. Such a requirement, should it be adopted—and we submit that Congress has

not adopted any such requirement—would necessitate drastic changes in time keeping methods universally employed. It would mean that nearly every plant in the country would be in violation of the law and that billions of dollars in retroactive overtime payments and liquidated damages could now be assessed against thousands of companies—and only because they have since 1938 figured hours of work in precisely the same way that the computation had been made without question for many years.

Such a result would not be helpful to the cause of labor. It would only open the door to demands involving minute, even microscopic determination of the precise number of minutes and seconds for which an employee could claim pay. If his wage must be paid from the moment he punches the time clock, should he not be paid also for the particular number of minutes or seconds that he spends in line waiting to punch the time clock? Should he not, indeed, be paid from the moment he enters the door? Bickering over such *minutiae* was not contemplated when the Fair Labor Standards Act was adopted. This was not one of its purposes. If employees were given a right to insist upon such a demand, employers would doubtless counter with requirements that employees must start work and become subject to strict control of management from the very moment they enter the company's premises. Doubtless, employers would likewise insist that after beginning work employees must keep at the job until quitting time. Any such requirement would retard the development of the beneficent practices of allowing rest periods, and time off for a "snack" on the job, and the privilege of quitting work a few minutes before quitting time when convenient (these practices, as the testimony shows, had all prevailed in respondent's plant).

Then, too, the practical difficulties of making any such a precise computation must not be overlooked. The Circuit Court of Appeals in the *Tennessee Coal* case relied in part on "the practical difficulties incident to the computation of isolated moments so elusive in character" (135 F. (2d) 320, 323), in denying the employees' claim for compensation for time spent on the surface. This thought, we believe, was reflected in the suggestion of the Supreme Court that custom and contract would be helpful considerations in determining the factual question of working time where precise computation is difficult or impossible or where the facts give rise to serious doubts as to whether certain activity constitutes work (321 U.S. 590, 603). Surely, such a case is here involved. The additional time and money which would be spent in making the precise computations required to determine to a fraction of a minute each day exactly how long an employee was in the plant, would involve costs much greater than any increase of a few pennies a day which the employees might be able to claim.

It should also be remembered, if the findings of fact herein are to be reviewed, that the testimony of the petitioners' witnesses in this case relates only to the time when they entered the plant in the morning. It is not hard to see why employees coming from a considerable distance, leaving their homes in the surrounding countryside to work in this small factory in this little town, would have often arrived early in the morning. Their claim might present a different question if there was testimony of activities performed on the employer's behalf after working hours. But at the end of the day employees frequently would finish work before quitting time and then after washing up would smoke and chat with fellow employees and walk over to the time clock so as to be able

to punch out exactly at quitting time. It would offend common sense to say that there was error in the concurrent factual determinations below that time spent on purely personal activities at the end of the day, or at lunch time, after quitting work, but before punching out, must be computed and paid for as hours of work.

IV. The Judgment of the District Court Cannot Be Sustained

One of the grounds on which the Circuit Court of Appeals rested its decision herein was the proposition that the District Court erred in refusing to accept the findings of fact by the Master. This point we have discussed above (p. 64), and we will not repeat these arguments.

Another ground on which the Circuit Court of Appeals relied in ordering petitioners' action dismissed was that the judgment of the District Court was arbitrary and based on surmise and conjecture (R. 1596). In view of the importance of this point, we should like to restate in some detail the arguments which persuaded the Circuit Court of Appeals to reach this conclusion. Such a statement, we think, will amply demonstrate the correctness of the conclusion reached in this respect by the Circuit Court of Appeals.

1. JUDGMENT OF THE DISTRICT COURT WAS BASED ON SURMISE AND CONJECTURE

The District Court, it will be recalled, ruled that an employee who entered the factory and punched the time clock more than 7 minutes before starting time at the beginning of the work day (or more than 5 minutes before starting time after the lunch period) should be credited

with an extra minute of working time for each minute that the ring-in time as shown on his time clock card preceded the times above stated, regardless of whether or not there was any proof that the employee started work before starting time. For example, an employee who punched the time clock 8 minutes before starting time would be credited with having started work one minute before the starting time (if at the beginning of the day) or 3 minutes before starting time (if at the beginning of work after the lunch period).

We submit that this formula was erroneous as being based on surmise, speculation and conjecture, unsupported by any substantial testimony, and representing only an estimate of an amount of overtime which might have been worked under hypothetical conditions but which estimate (a) was shown to be inaccurate as to many employees, and (b) was not shown to have any reasonable basis as to any employee, and (c) was not supported by proof of actual work done by any particular employee on any day.

c. The Formula Embodied in District Court's Judgment Was Not Supported by any Evidence

Even the testimony of petitioners cannot be construed to support the finding and judgment of the District Court. As the Master pointed out, the petitioners did not testify generally as to the time production work started (R. 175). Indeed, the insufficiency of the testimony in this respect was adverted to on several occasions by the trial judge. Note, for example (R. 1506), the District Court's characterization of the proofs offered by petitioners as "testimony that wasn't worth a continental."

Although there were nearly three hundred employees involved in the action representing some twelve produc-

tion departments, petitioners (in putting in their testimony in chief) called only seven witnesses representing four departments. On rebuttal, an eighth employee was called. We have at most, then, testimony from eight employee witnesses (out of some 280 or 290 in the suit) representing four departments (out of a total of twelve departments that were involved).

Two witnesses were called from the brushing and dipping department. Steve Anderson, the first named petitioner and president of the plaintiff Union, testified (R. 411) that he was at work half a minute after punching the time clock. However, on cross-examination this witness admitted that he could not recollect or state just what he did after punching the time clock card; he said that he was just averaging things up and giving a guess (R. 539, 550). He said that he did not know when he started production work (R. 539), and that he could not tell by looking at the time clock cards when they went to work (R. 533). The other petitioner called to testify as to conditions in the brushing and dipping department was Mrs. Lillian Socia. This witness originally said that she would begin production two or two and one-half minutes after punching in (R. 740). As above pointed out, the Master did not accept this testimony, nor did the District Court. She admitted on cross-examination that she had no recollection as to just how much time she may have spent on any particular day in talking to other employees and walking to her department (R. 769-775), and she finally admitted that the time of starting work would vary somewhat from day to day, and that her estimate was only a guess (R. 775).

Two witnesses were called from the clay shop: Metz and Larimer. Metz, on direct examination, said that it would take one or two minutes to get to the clay shop

department, after punching in at the time clock, adding voluntarily, that such estimate was only a guess (R. 610-611). On direct examination he merely said that after punching in he went to his department (R. 610). On cross-examination he admitted that it was sometimes after starting time when work started (R. 648).

Larimer, the other witness from the clay shop, claimed that he would go right to work when he got to the department (R. 696). This, of course, must be taken subject to the admitted fact that he could not begin production until his entire crew was on hand. Further, he was not referring to production work (R. 696).

In the decorating department in which were employed many of the claimants in this case, the petitioners offered no testimony to the effect that any of the employees in this department started work prior to the regular starting time. Only one employee witness was called from this department. She did not testify that she started work before the starting time but said only that after punching the time clock she went to her bench (R. 846). This can be understood in the light of other testimony that the girls in the decorating department would stand around the work benches and spend the time talking if they arrived in the department before starting time (R 1401). This witness did not testify that she started work after arriving at her bench. She did, on the contrary, say that the red pencil figures on the right hand side of the time clock cards were the hours she worked, which is exactly what the respondent claims (R. 862). She did not contradict the testimony of respondent's witnesses that work did not start before starting time (R. 1400-1403).

Three witnesses were called from the glost belt department. The first witness, Trombley, testified on direct exam-

ination that he punched in at fourteen minutes to the hour and went directly to work (R. 426). On cross examination he admitted that if the other employees were not ready for work when he arrived in the department it would be impossible for him to do any substantial amount of work (R. 453-455). He admitted that he couldn't say just when he started work on any day (R. 480, 516); he never timed himself (R. 458). Finally, he said that the department started at seven o'clock, which was, of course, the regular starting time (R. 484). The second witness from the glost belt department, Dacko, testified on direct examination that it took a minute or two to go from the time clock to his department, but he did not testify that he started work upon arriving in the department (R. 180, 905). On cross examination he admitted that work could not start until most of the entire crew was there (R. 927), and said that he could not fix the time of starting production nor could he recall as to any day what he did after punching the time clock and before starting work (R. 948). The third witness from the glost belt department, Pearl, did not even give an estimate as to when work started but contented himself with contradicting his own time clock cards and the testimony of other petitioners from the same department by saying that he punched in at fourteen minutes to seven, and had to run to get to the department because production had already started (R. 1484).

There is, to be sure, a claim by some of these witnesses that on occasion they started work before the regular starting time. *But there is nothing in their testimony to support any computation as to the amount of time that any of the petitioners may have spent at work on any day prior to the regular starting time* (even if the

Court could disregard the evidence presented in denial of these claims, and the demonstrated unreliability of the testimony of these witnesses, and the Master's non-acceptance of this testimony, all discussed above). There is no connection at all between the testimony of these plaintiffs and the formula adopted by the District Court, to the effect that all employees started work seven minutes after reaching the time clock in the morning, and five minutes after reaching the time clock in the afternoon, subject to the proviso that if they punched the time clock less than seven minutes to the hour (in the morning) or five minutes to the hour (in the afternoon), they proceeded more rapidly and started work by the regular starting time.

b. There is No Evidence to Support the Claims of Those Who Did Not Testify

It is certain, likewise, that there is no basis in the testimony of these witnesses for any finding as to when other individuals started work. For example, witness Trombley testified that he couldn't say how long it would take other employees in his department to get ready for work (R. 452, 456). Similarly, witness Metz testified that the time of starting work would be different for different individuals (R. 643-44).

Not only does the testimony of the witnesses who were called by petitioners fail to prove in any way what time other employees in those particular four departments may have started work, but it should be borne in mind that there is no testimony at all with reference to the time of starting work on the part of petitioners employed in other departments (except for Exhibits 100-102, R. 1382, 1385, 1391, reproduced at R. 1588-1566, introduced by the Company, showing that in some of the departments

it would have been impossible for an employee to start work before starting time or to work more than eight hours).

As to these many claimants who did not testify, the record does not contain even any proof as to when they entered the plant. The complete time clock records of only eighteen employees were introduced. Because of a misapprehension on the part of the District Court, who apparently thought that there was some evidence showing that most all of the 280 odd petitioners had at least punched the time clock by eight or nine minutes before starting time, the Court made its formula applicable to all the petitioners, although as to more than two hundred fifty of them there was before the Court neither any testimony to the effect that they started work early, nor even any record showing that they had entered the plant before starting time.

Can there then be any question as to the correctness of the Master's holding that petitioners did not prove their claims with sufficient accuracy to permit any computation? Can there be any question but that the formula adopted by the District Court is based only on conjecture and speculation? It cannot perhaps be said to be based on an average because there was not sufficient testimony presented to permit the striking of any average at all. The District Court said in its opinion (R. 242) that the Court was convinced that many of the petitioners were in the shop before starting time. This is probably correct. But then the District Court went on to hold that if the employees were in the shop before starting time, they must have started work before starting time. This determination is not based on any evidence, but is contrary to the testimony, and is based only on conjecture.

c. The Formula Embodied in the Judgment of the District Court Disregards Admitted Facts

i. No Basis for Distinction Between Morning and Afternoon Punch-ins

The formula, it will be recalled, adopts different rules as to the morning punch-in and the afternoon punch-in. As to the period when employees were coming into the plant to start their day's work, the District Court adopted the rule that an employee who punched in at the time clock between fourteen minutes and seven minutes before the regular starting time would be conclusively presumed to have started work seven minutes after punching in at the clock. As to the period when employees were re-entering the plant after lunch, the formula provided a conclusive presumption that employees who punched in at the time clock between fourteen minutes to the hour and five minutes to the hour started work five minutes after punching the clock. There is no reason given in the Court's opinion, nor can any basis be discovered in the record, for this two-minute differential between the morning punch-in and the afternoon punch-in.

We submit there can be no question but that it would take just as long to get the employees started back to work after lunch as it would to get them started to work in the morning. In fact, there is testimony that the employees were somewhat slow about getting back to work after lunch (R. 1023).

But there remains one even greater difficulty with the District Court's formula as it applies to employees coming in to start work after their lunch period. The Court overlooks the fact that the testimony of the petitioners related solely to the starting of work at the beginning

of the day. Petitioners' witnesses did not testify as to starting work early after lunch. The testimony of the respondent's witnesses is uncontradicted that the petitioners never started work before the established starting time after the lunch period.

ii. The Formula Does Not Take Into Account the Admitted Occasions When Employees Started Work Late

The very statement of the formula suggests one vital defect therein. If a man who punched in at ten minutes to the hour does not start work until seven minutes after he punches in, would not the same thing also be true of a man who punched in at three minutes to the hour? It is a poor rule which does not work both ways. If a formula is to be applied at all, should it not be applied in the same way to the case where a man punches in at three minutes before starting time as well as to the case where a man punches in at ten minutes before starting time, with the result that in the former case it would be ruled that the employee who punched the time clock at three minutes before the starting time did not start work until four minutes after the starting time?

This suggestion is not only logical but it is supported by the testimony. For example, petitioners' witness Metz said that he sometimes would not start work until after the regular starting time (R. 648). Respondent's witness Fitton testified that on frequent occasions many of the employees were just getting started to work at fifteen minutes after the regular starting time (R. 989). Seldom would he see anyone ready to go to work at the regular starting time (R. 993). Witness Starner testified that on the average people got started on production a little after the regular starting time (R. 1011). They would

quite often be five or ten minutes late (R. 1017). Witness Trabue testified that it was a matter of daily experience to find some of the girls coming in to the decorating department after the regular starting time (R. 1399).

Of course, if the District Court had given the formula its full effect, the result would have been entirely different. If a man who punched in at ten minutes before starting time on Monday (and thus was awarded three extra minutes of working time under the District Court's formula), on the next day punched in at three minutes before the regular starting time, he would have had four minutes deducted from the computation of his hours of work for that day. The result would be in many cases that instead of a determination of a few extra minutes of work during the week (which is the unit on which overtime is figured) there would be a determination that no overtime had been worked.

Further, the formula disregards the fact that petitioners admittedly often started work late and quit early. The Master specifically found that this would counterbalance any possible instances where work started early (R. 191). This finding was not discussed by the District Court. Similarly, the employees concededly took time off during the day. This averaged about 25 or 30 minutes daily (R. 1282). Yet the District Court's formula makes no allowance for these factors. They clearly should be recognized. If this were done, there would be no recovery.

d. Formula Was Based on a Misunderstanding of the Record

The District Court's opinion, in explaining the formula, states that upon examining the time cards the Court notices that whenever the starting hour was 7:00 o'clock, the punching of the clock would begin at fourteen min-

utes to seven, and by nine minutes to 7:00 o'clock, 75% of that shift had registered for work, and that by eight minutes to 7:00 o'clock only a few stragglers were left (R. 242). It should be borne in mind that the Court could not have examined the time clock cards for more than eighteen employees. It was only this number of cases where the collected time clock cards of an employee were put in evidence. It is clear that the Court's conclusion could not be based on the time clock cards of less than twenty employees, when the plant employed some 1200 employees. Certainly these eighteen sets of clock cards would not show what per cent of all the employees had punched in at eight or nine minutes to the hour. The testimony of the witnesses who testified as to the time when the bulk of the employees entered their respective departments, ready to work, stands uncontradicted to the effect that it was not substantially before the regular starting time (R. 989-990, 993, 1014, 1017, 1018, 1402-03, 1303-04, 1120, 1126-27). Application of the formula to the 18 employees whose clock cards were in evidence produces the following results (R. 277, et seq.; R. 299, et seq.), covering the full period involved in the suit. It will be noted there is no pattern whatever. Do not these figures demonstrate that the formula was not based on the time clock cards of these employees?

Exhibit No.		Amount Held Due as Overtime	Liquidated Damages	Total
1	Steve Anderson	$ 8.39	$ 8.39	$16.78
2	Earl Trombley	3.27	3.27	6.54
5	Rita Schulte	7.41	7.41	14.82
16	Mary Sawicki	9.64	9.64	19.28
31	John Metz	.24	.24	.48
34	Earl Larimer	.13	.13	.26
35	Lillian Socia	6.81	6.81	13.62

39	Goldie Broniecki (Not a plaintiff)			
58	Eva Freddle	7.09	7.09	14.18
62	Dorothy May	3.33	3.33	6.66
63	Nick Dacko	4.18	4.18	8.36
74	Delbert Phillips	.00	.00	.00
75	Wells Clay	.01	.01	.02
82	Clarence Burgess	8.67	8.67	17.34
83	Nelson Luchtman	10.37	10.37	20.74
93	Floyd Pearl	8.93	8.93	17.86
94	Harry Lozen	8.97	8.97	17.94
95	George Leibziet	2.67	2.67	5.34

This conclusion by the Court, then, was not based on an examination of time clock cards nor on the testimony of any witnesses, but was based necessarily on the interpretation which the Court erroneously placed upon Exhibits 97, 98 and 99 (R. 1378, reproduced at R. 1555). This is further apparent from the transcript of the proceedings of June 8, 1943 (R. 1502).

The Court's opinion, however, is based on a misunderstanding as to the nature and content of these three exhibits. These three exhibits show only the punch-in times of a group of about 200 employees, using one particular time clock during a designated 15-minute period on three specific days (R. 1375). These persons were not (except in occasional instances) the petitioners. Clearly, these exhibits do not afford any basis for a conclusion as to the normal time when the petitioners punched time clocks.

These exhibits were, on the contrary, limited to narrow purposes. They tend to show that the employees did not all punch in 14 minutes early, as petitioners claimed. They also tend to show how many employees could pass by the time clock in a minute. More particularly, they show (when compared with Exhibits 100, 101, and 102, R. 1382, 1385, 1391, reproduced at R. 1558, 1564, 1566) that even

in departments where there was no absolute physical impediment to starting work before the regular starting time, the employees punched in no earlier than in those departments where operations were on a three-shift round-the-clock basis and where there was no question but that the employees did not start work before the regular starting time. From this the natural inference (adopted by the Master, R. 186) was that since the sample group of employees punched in at approximately the same time as did employees in those departments where work could not have been started ahead of time, it should be presumed that the other employees likewise did not start work before the regular starting time.

Not only did the District Court err in assuming that these exhibits were some evidence as to the average or normal punch-in time for all the claimants, but the District Court apparently misinterpreted and miscalculated the figures appearing in these exhibits. The Court declared in its opinion that by nine minutes to 7:00, 75% of the shift had punched in (R. 242). It appears, however, that on Exhibit 97, 121 out of 208 employees, or 58%, had punched in by nine minutes to seven (i.e., between 6:46 and 6:50 plus fifty-nine seconds). On Exhibit 98 the corresponding figure is slightly under 59%, and on Exhibit 53 it is 53.5%. On the average then, between 56% and 57%—and not 75%, as stated by the Court—had punched in by nine minutes to 7:00.

Even if we add those punching in between nine minutes to the hour and eight minutes to the hour so as to ascertain how many had punched in by eight minutes to, we get only the following percentages:

Exhibit	97	72%
"	98	72%
"	99	65%

In other words, even by eight minutes to the hour (i.e., 6:51 plus 59 seconds), less than 70% of the employees referred to in these exhibits had punched in.

Again, the District Court's opinion says anent these three exhibits "by eight minutes to seven but a few stragglers were left" (R. 242). But we find, counting up those who punched in at eight minutes to or later, that this includes nearly 28% of the whole group shown on Exhibit 97, 28% again on Exhibit 98, and nearly 35% on Exhibit 99. Where approximately 30% of the group covered by these exhibits punched in at eight minutes before starting time or later, it can scarcely be said that by eight minutes to the hour only a few stragglers were left.

We submit, therefore, that it is clear that the District Court misunderstood these three exhibits and miscalculated the figures appearing on these exhibits. Yet it was on this misunderstanding and miscalculation that the formula was arrived at.

e. Formula Was Based on Assumptions of Fact Which Were Without Support in the Evidence

The District Court was apparently persuaded that some method should be devised to allow a recovery in favor of petitioners, as a result of certain assumptions of fact which the District Court made in its opinion, but which are clearly without support in the evidence, and contrary to the well supported findings of the Master. For example, the District Court declared, in connection with announcing this formula, that the evidence was not seriously controverted that the foremen told the employees when work would start and when to get there, and when they told employees that work would start at 6:45 they would also mention, or in some manner designate, the hour of 6:31 (R. 242). It would be difficult to say that this con-

clusion was supported even by the testimony of the plaintiffs. Certainly, it cannot be said that "the evidence was not seriously controverted." All of the foremen were definite in their denials of any such suggestion. They testified that they told the employees only to be in their department by starting time. Their testimony was not impeached and was accepted by the Master (R. 173. See R. 1005, 1040-41, 1205, 1305, 1311, 1399, 1406).

It is undisputed that no one was ever docked or penalized in any way if he was on hand by the established starting time, and there was no compulsion on anyone to get there before that time.

The District Court's opinion then says that respondent's witnesses admitted that at times when a crew was ready to work they might "jump the gun" and start work before the regular starting time (R. 243). This is scarcely an accurate statement of the testimony. Witness Starner said that it was possible that some employees might start a minute or two before starting time but not earlier than that (R. 1061), and he emphasized that instances where an employee might start a few moments early were more than counter-balanced by instances where the employee started work after the starting time and quit work early. This was the finding of the Master (R. 191). Respondent's witness Fitton was positive that employees did not start work before starting time. He said that it was very seldom that anyone would be ready to work by starting time, although a few employees might be seen fixing their scrappers at one or two minutes before starting time (R. 993, 994). In the brushing and dipping departments the foreman testified that occasionally an employee might have one or two pieces dipped before the regular starting time, but no more than that

(R. 1173). This would be a matter of a second or two. As noted above, there was no evidence by the petitioners as to work starting as much as a second before the regular starting time in the decorating department. And in the glost belt department (the only other department referred to in the testimony) the Company's witnesses all testified that the belt was started for production purposes at the regular starting time (R. 1472, 1302, 1233). It is clear that no work could be done in this department until the belt was started.

The Company's witnesses did not attempt to hide the fact that on particular jobs where it was physically possible for work to begin before the regular starting time, there were occasional instances in which an individual employee might start work one minute or possibly two minutes (but not more) before the regular starting time. However, the witnesses were clear that the average starting time was somewhat after the time set for beginning work. This was not to any degree contradicted by petitioners' witnesses. As pointed out in the Master's report (R. 175) the petitioners did not generally testify, in putting in their case in chief, as to when actual work was started. At least one of the petitioners admitted that it would sometimes be after the regular starting time before they started work (R. 648). Similarly, the petitioners readily agreed with the Company's witnesses that employees frequently quit work before the regular quitting time (R. 656, 669, 728). This was found by the Master to be a fact (R. 191), and this finding was not disturbed by the District Court. We submit there can be no doubt but that the Master correctly found that any occasional instances, where an employee might have "jumped the gun" by a few moments, were more than

counterbalanced by repeated instances where that same employee started work late or quit work early (R. 191).

However, the District Court, on the assumption that where employees were engaged on piecework operations they would start work before starting time as often as they possibly could, adopted the formula above set forth. We repeat, this assumption was not based on the record but represented rather the Court's personal guess or belief (R. 243). The record is replete with testimony that the employees did not start promptly but instead stood about and talked if they arrived in their department before starting time—and the Master so found. The Court's assumption was further based on the Court's misunderstanding that the bulk of the employees were shown to have been in their departments and ready to go to work considerably before starting time.

The District Court's Supplemental Opinion of March 30, 1944 (R. 287) refers to a re-examination by the Court of the testimony. At that time neither the transcript nor the exhibits (save Exhibits 97-99) were in the custody of the Court, and the Court's reference must be to these three exhibits and to the briefs which had been filed.

Some mention should also be made of other observations found in the District Court's opinion as to the facts of the case, which are important since they apparently were persuasive factors in inducing the Court to believe that some formula should be devised which would allow some recovery to the plaintiffs.

The District Court in its opinion stated that the Company through its foremen had sought to circumvent the Fair Labor Standards Act (R. 243). We submit that there is no support in the record for such a finding. We

find nothing in the testimony of the petitioners to support it. The testimony of respondent's witnesses, which was believed by the Special Master, and also the uncontroverted circumstantial evidence, strongly indicate the error of this finding.

At the time the Fair Labor Standards Act was enacted the General Manager of the Mt. Clemens Pottery Company called a series of meetings at which the law was explained to the foremen, and they were instructed that it would be the policy of the Company to limit hours of work to the maximum straight time hours permitted under the statute, and they were told that it would be their responsibility to see that this policy was carried out. The matter of the Wage Hour law was frequently discussed at weekly foremen's meetings, and the foremen were reminded of their responsibility to make sure that no employee was working longer hours than permitted (R. 987, 1008, 1306, 1162). The employees were instructed not to start work before the regular starting time (R. 810, 811, 1018). There is abundant testimony that these instructions were carried out and that employees did not start work before the regular starting time, and that except in cases where overtime was specifically authorized, employees did not work more than 40 hours a week during the period, since October 24, 1940, when this was the maximum for straight time (R. 987, 1009, 1186, 1405-06). The petitioners themselves did not state that they worked more than 40 hours a week. The most that any of the petitioners claimed—and this by inference rather than direct statement—was that they sometimes started work ahead of the established starting time in the morning. They did not testify that (taking into consideration days when they started late, and taking into consideration periods during the day when they were not at work, and

taking into consideration the frequent occasions when they quit early) they worked more than 40 hours a week. Indeed, the witness Freddle said that the Company's computation of her hours of work as recorded on the time clock cards represented the hours that she worked (R. 862).

The Company's foremen testified that they were repeatedly instructed that they must make sure that the provisions of the Act were complied with in their respective departments. Fitton testified (R. 987) that the foremen were instructed at foremen's meetings not to permit employees to work in excess of the number of hours specified in the Wage Hour law, and that those directions were carried out in his department. Starner testified to the same effect (R. 1008) and added that he insisted that the employees must not start work before starting time (R. 1018). Likewise, Harms said that the instructions that employees should not work more than 40 hours a week were carried out in his department (R. 1186). Trabue explained that the girls employed in his department actually worked fewer hours than the hours of work as computed by the Company (R. 1405-06). Stief explained that the Wage and Hour law was frequently discussed at foremen's meetings, and the general manager of the Company cautioned the foremen to abide by the law (R. 1306).

The Company's whole course of conduct was inconsistent with any attempt to evade the law. A Company which voluntarily increased rates and paid its employees large sums of extra compensation beyond their earnings (as discussed *infra*) would not have undertaken to deprive its employees of extra half time pay for a few seconds or minutes a day. It would not have taken the risk of incurring liability for a breach of the statute. If

any thought had occurred that retention of customary methods of computing hours worked might involve a violation of the law, the Company would have increased the computation of hours of work. It could have done this without cost, in fact, as discussed above. Further, the amounts here claimed are picayune when compared with amounts of extra compensation voluntarily paid the employees (R. 277-284). The Master's report reviews in detail the various matters of circumstantial evidence which make it clear that the Company would not have profited by any attempt at evading the law in the method which petitioners claim was adopted. The Master likewise pointed out that any such course of action would have been entirely inconsistent with the Company's established practices and policies (Master's Report, R. 188-191).

There can be no question but that this Company made a *bona fide* effort to comply in all respects with the law. The Master was convinced of this (R. 189). The District Court did not point out any error in this finding.

We submit that the record fairly supports the conclusion that the employer did not know of any instances where employees worked overtime. It is clear that the employer had no notice of any such claim. Indeed, the employees did not make any such claim for the reason (as testified by Metz, R. 651) that it did not occur to them that they were working overtime.

The employer not knowing of any uncompensated overtime work being performed by the petitioners, or any of them, it must be concluded that the employer did not suffer or permit the petitioners to work uncompensated overtime. It therefore is not liable in this action. *Fox et al. v. Summit King Mines, Ltd.* (C.C.A. 9, 1944), 143 F.

(2d) 926. See also *Stein v. Gordon Bros., Mfg. Co.*, (D.C. Mo. 1942), 43 F.Supp. 249, and *Jackson v. Derby Oil Company*, 157 Kans. 53, 139 P. 2d 146 (1943).

f. Formula Was Inconsistent With Uncontradicted Testimony

Not only is this formula based on a misunderstanding of the exhibits, and on an assumption of facts which are without support in the record; but the application of the formula is in many respects inconsistent with the uncontradicted testimony.

The formula allows five minutes for the group of workers to punch through the time clock (R. 243), but the record shows that on the average there were approximately 200 employees and upwards, using each time clock during each 14-minute punching period, and that an average of not more than twenty-five employees could punch the time clock per minute (Master's report, R. 183-84; Exhibits 97-99, R. 1378, reproduced at R. 1555-57, and the testimony of witnesses Doll, Sr., R. 1125; Doll, Jr., R. 1228; and Wright, R. 1341). This would mean that it would take at a minimum eight minutes for the employees to get by the time clock, as pointed out by the Master (R. 184) and by the District Court (R. 1501). Since the employees started in at fourteen minutes to the hour, it would be six minutes before the starting hour before the employees could even get by the time clock. But the District Court's opinion erroneously assumed that most of the employees had punched in at the time clock by eight minutes before starting time, and that five minutes was a reasonable allowance for getting the group of employees by the time clock (R. 242, 244).

Even if there were any showing that substantially all of the employees had punched in at the time clock by six minutes before starting time (it could not have been

earlier than this, as pointed out *supra*), still it is clear that they could not start work until they had at least walked to the departments where they worked. All of the lower courts agreed on the factual finding that the time so spent was not, in these circumstances, work time.

If, then, it be said that the majority of the employees had punched in at six minutes to the hour, and that it took them two or three minutes to walk to their departments, we would then find that the employees would not even be in their departments until three or four minutes to the hour.

Those who got there that early would wait for the others to come in, so that, after all the members of the crew had arrived, work could begin.

At the very best, then, it would be less than three minute before starting time before there would be any possibility for work to start even in those departments where the employees could turn on their own machinery whenever they were ready, and start work as soon as their group was assembled.

Yet the District Court's formula results in many employees being credited with starting work seven minutes before starting time.

But, of course, we insist it would not be enough to support any recovery for petitioners even if it were shown (we repeat, there has been no such showing) that most of the employees were in their departments before the regular starting time. The petitioners would have to show not only that they were in their departments (and they did not show this) but also that they started work before starting time; and as the Master pointed out (R. 175) the petitioners did not generally testify as to when they started production. The attempt of the District

Court to meet this lack of proof by adopting the formula in question leads to many strange results.

For one thing, the District Court's formula overlooks the fact that the employees in most departments did not work individually but in groups. In some departments the employees worked in groups of three; in other departments the groups were much larger. Whatever the size of the group, no individual in the group could start work until the entire crew was at work. Suppose, for example, that in a group of three employees one individual punched in fourteen minutes before starting time, the second individual at ten minutes before starting time, and the third individual at seven minutes before starting time (the record, as above noted, discloses wide variations in punch-in time). None of them could possibly start work until the man who punched in at seven minutes before starting time had gone to his department and was ready to work. Under the formula, one of these three men gets credit for seven minutes extra work, the second gets credit for three minutes of extra work, and the third gets no extra credit. Yet there can be no question but what they all started work at the same time.

Similarly, under the formula adopted by the District Court, recovery is allowed employees in those departments which were on two-shift or three-shift operations, where one man succeeded his predecessor on the same machine. Here we have a case where one employee is engaged in operating a machine until the quitting time for his shift. That quitting time is coincident with the starting time on the next shift, when another employee takes up the operation of the machine. Yet, under the District Court's formula, the employee, who could not possibly start to operate the machine until his predecessor had stepped aside, is given credit for as much as

seven minutes extra work. The situation is, of course, most striking in those departments which were on three-shift operations, and where the effect of the Court's formula is to rule that it takes as much as twenty-four hours and thirty-six minutes for three employees to operate a machine twenty-four hours a day.

The formula is again inconsistent with the testimony in that it allows recovery on the basis of 80 minutes extra "time worked" in a five-day week, in the case of an employee who regularly punched in as soon as the time clock opened. However, as the Master's report points out, even if time spent in preliminary preparatory activities could be computed and were counted as "time worked," still "such time under the most liberal estimates could not have aggregated over one-half hour per week" (R. 202). The District Court allowed more than the petitioners' most liberal estimates.

g. Findings Too Vague and Indefinite

The District Court in its opinion announced that it agreed in the main with the findings of the Master that there was no proof of work being done before starting time (R. 241), but ruled that such findings would be modified by application of the presumption that an employee started work seven minutes after punching the time clock. Apparently, this overruled only the Master's finding of fact that work did not start before the regular starting time. There are, however, many other findings of the Master which the District Court did not challenge and which are entirely inconsistent with any such formula.

For example, the Master found that if an employee ever did start work early, this was more than counterbalanced by occasions when the employee started work

late and quit work early (R. 191). The District Court did not question the finding (indeed, some of the petitioners themselves admitted, as discussed above, that they sometimes started work after the starting time and often quit early). Yet the formula which was adopted as the basis of the District Court's judgment, is entirely inconsistent with these admitted facts. They are not taken into account.

Again, the District Court's findings state only that *some* of the employees started work early (R. 272). Yet the formula was made applicable to *all* employees represented in the action and resulted in an allowance of additional time worked in cases where an employee was on a job where it would have been physically impossible for work to have started before the starting time.

2. Review of Decisions Denying Recovery in Wage-Hour Law Suits Where Award Could be Based Only on Surmise and Conjecture

Applicability of the well established general rule (that a judgment or verdict cannot rest upon mere guesses, estimates, averages, speculation or conjecture) to actions brought by employees under Section 16 (b) of the Fair Labor Standards Act, is established by many cases.

Particularly interesting and closely analagous to the particular situation here involved is the decision in *Townsend, et al., v. New York Central Railroad Co. et al.*, (C.C.A. 7, 1944), 141 F. (2d) 483. In that case the claim was made that approximately one thousand redcaps had been paid subminimum wages. Petitioners sought to prove their case by calling nineteen witnesses who testified that they reported having received greater tips than they had in fact received, and that, as a result, the employer (who paid them the difference between the tips re-

portedly received and the minimum wage required by the law) had underpaid them. In affirming the decision of the District Court that judgment must be for the defendant because the plaintiffs had failed to prove their case, the Court said at p. 485:

> "... the lower court concluded as a matter of law: 'The burden was on each of the plaintiffs to prove by a preponderance of the evidence that he did not receive the wages that he was entitled to receive under the Act from his respective employer-defendant for one or more specific pay-periods during the time covered by this action.'
>
> "We think there can be no question concerning the correctness of this conclusion. *Johnson v. Dierks Lumber & Coal Co.*, 8 Cir., 130 F. 2d 115; *Epps v. Weathers*, D.C., 49 F. Supp. 2; *Feldman v. Roschelle Bros.*, D.C., 49 F. Supp. 247. Under plaintiffs' stated theory of liability, this burden required plaintiffs to establish not only that excessive tips were reported, but the amount thereof, as well as the pay period during which they were so reported. This is so, irrespective of the charge or proof concerning coercion, for the reason that it would be immaterial whether the reporting of tips in excess of the amount received was the result of coercion, mistake or otherwise.
>
> "Furthermore, even though the court had found that the 19 plaintiffs who testified had reported tips in amounts greater than received, as a result of coercion or for any other reason, such a finding could not support a judgment as to the remaining 1,072 plaintiffs. In addition, the testimony of the plaintiffs who testified was speculative and uncertain as to any amount which that particular plaintiff reported over the amount received. We agree with the lower court that the burden was upon each plaintiff to prove the amount reported

in excess of that received before that plaintiff would be entitled to judgment. All of the plaintiffs having failed to offer proof in this respect, it follows that none of them were entitled to judgment."

In the instant case the claim was that some 280 or 290 employees had started work before the established starting time, and they attempted to prove it by calling eight witnesses, some of whom (but not all) gave testimony from which it might be inferred that they claimed to have sometimes started work before the starting time. They did not even estimate how much before starting time they started work (see Master's Report, R. 175). Some of the petitioners' witnesses did not testify that they ever started work before the regular starting time. There was no substantial testimony at all with reference to those who did not testify. Nor is there any proof as to the weeks when the alleged overtime was worked; in many weeks, employees worked less than 40 hours on any method of computation. Surely such testimony could not support a judgment as to some 250 or 300 employees. The rule is the same whether the uncertainty relates to the amount of wages paid or the amount of time worked. *Young v. Andrews* (D.C. Ga. Oct. 10, 1944), not officially reported, 7 W. H. Rep. 1040, 8 Lab. Cas. par. 62,365, involved an action by two porters employed at the depot of an interstate bus line. They claimed in part that they had not been properly compensated for overtime. The plaintiffs sought to establish their hours of work by proof that they were required to meet the first bus in the morning and remain until the last bus at night. Schedules of the bus lines were introduced to establish the hours thus encompassed. However, the testimony of the plaintiffs as to the irregularity of their time off and as to the variance of hours during periods when other help was

employed, made it impossible to determine exactly what hours they worked. The Court said:

> "As will be seen from the above findings of fact, the court finds it impossible to ascertain with any degree of certainty the amount of overtime work performed by the plaintiffs. It might be stated that the court is satisfied that some overtime was performed but, it being impossible to determine except by guess or speculation the amount thereof, it is not deemed proper to allow recovery for overtime and its consequent time and a half recovery, plus an equal amount as liquidated damages."

The Fifth Circuit Court of Appeals has applied this same rule in cases where, as here, the claim was based upon the theory that the plaintiffs had worked longer hours than they were paid for. In *Jax Beer Co. v. Redfern* (C.C.A. 5, 1941), 124 F. (2d) 172, the Court held that statements as to the amount of hours worked "on an average" would not support a verdict. In that case, neither of the two plaintiffs (drivers of delivery trucks employed by a beverage distributor) was able to testify as to the number of hours worked each day, but testified that "on the average" they worked from seven in the morning until nine at night. The Trial Court concluded that there was sufficient evidence to support a verdict, and entered judgment; but this was reversed, the Appellate Court holding that the evidence was so uncertain and conjectural that it would not support the verdict, ruling (p. 175).

> "To uphold the findings and judgment of the lower court we must base decision upon the guess, speculation, and averages made up from uncertain recollections of these appellees. This we refuse to do."

Similarly in *Bowman v. Pace Co.*, (C.C.A. 5, 1941), 119 F. (2d) 858, where there was a question as to whether plaintiff was an employee of defendant, the Court held that judgment was properly directed for the defendant, and pointed out there was a total lack of evidence as to how many hours plaintiff devoted to the service for which he sought compensation; and observed that the jury could have computed no verdict upon such a claim.

Interesting in this same connection is the language of the Fifth Circuit Court of Appeals in *Tennessee Coal and Iron Mines v. Muscoda Local No. 123* (C.C.A. 5, 1943), 135 F. (2d) 320, 323, where in denying a claim that time spent in preparatory activities should be counted as time worked, the Court stated as one of the bases of the denial "the practical difficulties incident to the computation of isolated moments so elusive in character."

Inasmuch as in such a case as this there is no cause of action unless overtime has, in fact, been worked in excess of what the employer's records show, greater certainty of proof is required than in cases where a cause of action admittedly exists and the only question is the amount of damages. *Roberts v. Hoarel* (D.C. Tex. 1941) (not officially reported), 4 Lab. Cas. 61,933. See also *Simmons v. Straight Improvement Co.* (D.C. N.Y. 1944) (not officially reported), 7 W.H. Rep. 1060, 9 Lab. Cas. par. 62,394, where the Court declared:

> "The burden is on the plaintiffs to establish the amount of overtime they worked. Their obligations include proving that item by evidence which is definite and clear."

A large number of decisions by lower courts exhibit so unanimous a trend as to be particularly persuasive as to the correctness of the following three points.

1. The burden of proof is on the employees to prove with reasonable certainty the amount of overtime worked.

Randolph et al. v. Calamas et al. (D.C. Ga. 1944), 8 W.H. Rep. 21; affirmed (C.C.A. 5, 1945), 8 W.H. Rep. 1029 (not yet officially reported);

Wilkinson v. Noland Co. (D.C. Va. 1941), 40 F. Supp. 1009;

Prins et al. v. Skaff (D.C. Mich. 1942), 47 F. Supp. 430;

Cordell v. H. F. Wilcox Oil & Gas Co. (D.C. Okla. 1941), 5 Lab. Cas. par. 60,807, 1 W.H. Cas. 815 (not officially reported);

Hayes v. General Tire Service, Inc. (D.C. Tex. 1941), 4 Lab. Cas. par. 60,698, 1 W.H. Cas. 707 (not officially reported);

Toppin v. 12 East 22nd Street Corp. (D.C. N. Y. 1944), 8 Lab. Cas. par. 62,032, 7 W.H. Rep. 217 (not officially reported);

Rich v. March (D.C. Tex. 1942), 2 W.H. Cas. 819, 6 W.H. Rep. 135 (not officially reported);

Vigiano v. Arena & Tona, Inc. (N.Y. Sup. Ct., Westchester Co., 1944), 8 Lab. Cas. par. 62,058, 7 W.H. Rep. 313 (not officially reported).

Even if the employer does not keep accurate records showing the precise number of hours worked, this failure does not in any respect ease the employees' burden of proof. In this case, the employer's records of hours

worked are, we submit, accurate, and in fact credit the employees with more hours of work than they had actually worked (R. 1406); but we think the point is significant as showing how far the courts go in requiring that employees who claim to have worked longer hours than they were paid for, must establish with reasonable certainty how many hours they worked.

> *Wilkinson, et al., v. Noland Co.* (D.C. Va. 1941), 40 F. Supp. 1009;
>
> *LaVann v. J. B. Kaufman, Inc.* (D.C. N.Y. 1944), 8 Lab. Cas. par. 62,308, 7 W.H. Rep. 790 (not officially reported);
>
> *Clevanger v. W. M. Ritter Lumber Co.* (Ky. App. 1943), 6 W.H. Rep. 674; 172 S. W. (2d) 625;
>
> *Feldman v. Roschelle Bros., Inc.* (D.C. N.Y. 1942), 49 F. Supp. 247.

In the last cited case plaintiffs sued for overtime and testified only from recollection as to hours worked. No records were brought forward in support of their claims. The employees had punched time cards but claimed they worked before and after punching their cards. The employer stated that the employees were absent some days, but no one knew what days. The Court refused to assess overtime damages, saying, 49 F. Supp. 247, 249:

> "If I accepted the testimony of the plaintiffs in its entirety, I would have a great deal of difficulty in computing the damages, but I do not accept their story as true in all respects. That being the case, it becomes impossible for me to determine during what periods the plaintiffs worked later than 4:30 P.M. From the evidence I cannot state

any one week in which the plaintiffs worked overtime. Any assessment of damages I might make would be pure speculation under the facts.

"While the law requires the defendant to keep a record of overtime, the failure of the defendant to so do is not evidence upon which I can compute these plaintiffs' overtime. The burden was on these plaintiffs to prove that they worked overtime and how much overtime they worked. The evidence as to the claimed overtime for any of the periods is vague, uncertain and does not carry the quality of proof to induce conviction. I cannot make a guess as to when the plaintiffs worked overtime or for how long."

2. Judgment may not be based on speculation or conjecture as to the number of hours worked by the employees. This point is stressed particularly in the following cases:

Mornford v. Andrews (C.C.A. 5, 1945), 151 F. (2d) 511;

Collins v. Burton-Dixie Corp. (D.C. S.C. 1944), 53 F. Supp. 821 (affirming Master's report);

Lowrimoore v. Union Bag and Paper Corp. (D.C. Ga. 1939), 30 F. Supp. 647, 1 W. H. Cas. 251;

Gerdert, et al. v. Certified Poultry and Egg Co. (D.C. Fla. 1941), 38 F. Supp. 964;

Mortenson v. Western Light & Telephone Co. (D.C. Iowa, 1941), 42 F. Supp. 319;

Jackson v. Derby Oil Co., 157 Kans. 53, 139 P. 2d 146 (1943);

Cintron v. Bull Insular Line (D.C. P.R. 1944), 7 W. H. Rep. 1062, 8 Lab. Cas. par. 62,378 (not officially reported);

Mosier v. The Retail Credit Co. (D.C. Kans. 1942), 5 Lab. Cas. par. 61,054, 5 W.H. Rep. 338 (not officially reported);

Williams v. O. G. Carlstedt (D.C. Tenn. 1940), 1 W. H. Cas. 299, 3 W.H. Rep. 1943 (not officially reported);

Clevanger v. Ritter Lumber Co. (Ky. App. 1943), 6 W. H. Rep. 674; 172 S.W. (2d) 625;

Willett v. Magnolia Petroleum Co. (D.C. Tex. 1941), 4 Lab. Cas. par. 60,348 (not officially reported);

Rosen v. Weissman (N.Y. City Ct. 1942), 5 W.H. Rep. 938, 2 W.H. Cas. 1055.

3. No judgment may be rendered in favor of claimant employees in an action under the Fair Labor Standard Acts where the testimony as to the amount of time worked is stated in terms of averages, estimates, or approximations. In this connection, see:

Epps v. Weathers (D.C. Ga. 1943), 49 F. Supp. 2;

Moore v. Perkins Dry Goods Company (D.C. Tex. 1942), 5 Lab. Cas. par. 60,940, 5 W. H. Rep. 168 (not officially reported);

Dollar v. Caddo River Lumber Co. (D.C. Ark. 1941), 43 F. Supp. 822;

Campbell v. Watts (D.C. Tex. 1942), 2 W.H. Cas. 325, 5 W.H. Rep. 360 (not officially reported);

Spier v. Gulf Coast Beverages, Inc. (D.C. Fla. 1943), 50 F. Supp. 653;

Gorchakoff v. California Shipbuilding Corp. (D.C. Cal., 1945), 8 W.H. Rep. 1109, 10 Lab. Cas. par. 62,811 (not officially reported);

Ralston v. Karp Metal Products Company (N.Y. Sup. Ct. 1942), 38 N.Y.S. (2d) 764, 179 Misc. Rep. 282;

Pelta v. Lach-Simkens Dental Laboratories, Inc. (N.J. Cir. Ct. 1942), 6 Lab. Cas. par. 61,263, 2 W.H. Cas. 1009, 5 W.H. Rep. 695.

V. Dismissal of Petitioners' Claims on Grounds that Respondent Had Already Paid Them Extra Compensation Many Times in Excess of the Amounts Claimed by Them Under the District Court's Judgment

While at all times denying that any uncompensated overtime was worked, respondent raised in the District Court a separate issue as to set-off.

This question was separately argued before the District Court, after the filing of the Court's original opinion, the Court having reserved arguments thereon. The precise inquiry was whether or not the amount of any judgment which might be rendered in favor of any of the petitioners should be satisfied by deducting, from the sums found to be due as extra compensation for overtime (under the formula adopted by the Court), the amounts of extra compensation voluntarily paid the petitioners

during the same period in excess of their agreed wages and overtime.

The Court's finding of September 13, 1943, recited that (R. 273) since the Court had reserved this question for further argument, the computations to be made by the Company should show both (a) the amount due under the formula adopted by the Court, and (b) the amount of extra compensation paid to each of the petitioners during the period covered by the computations.

The computations thus made showed that the total amount of extra compensation for overtime (computed as required by the Court's opinion) was $1,207.87 for 289 individuals, or an average of not quite $4.18, or approximately a penny a day. The extra compensation voluntarily paid these 289 individuals during the same period, in excess of their agreed wages and overtime, was $16,640.19, or an average of slightly over $57.57 (R. 285).

The District Court ruled (R. 291) that the set-off for which respondent contended should not be allowed. The Company, in appealing the judgment of the District Court to the Circuit Court of Appeals, alleged error on this ruling and it was included in the statement of points on which the Company relied on its appeal (R. 366). The point was presented to the Circuit Court of Appeals by brief and oral argument. That Court's opinion did not discuss this issue, having concluded on other grounds that the action must be dismissed. We submit, however, that even though the District Court's formula could be sustained, still it should be held that these payments of extra compensation may be applied to extinguish petitioners' claims.

1. THE NATURE OF THE EXTRA COMPENSATION

The nature of this extra compensation, which we claim should have been set-off against the recovery allowed under the District Court's opinion, was described as follows by the Master (R. 188):

> " . . . the company twice a year . . . made payments to its employees in addition to their regular piece rate earnings equal to approximately one week's pay each time . . . If the company had been trying to reduce its labor costs, would it not have occurred to it to cut out these payments, rather than take the chance of being found guilty of violation of the Wage and Hour Act, with the attendant double liability?"

It was agreed by all the witnesses that these sums—approximately two weeks' wages per year—were paid as extra compensation to the employees during the period covered by the action, each semi-annual payment representing two per cent of each employee's wages during a period of twelve months preceding the date of the payment (R. 1161). The payments were described by the Company as extra compensation (R. 813, 1393), and the petitioners so understood them (R. 736, 552).

There is, therefore, no doubt as to the fact that these payments were considered as compensation for services and not a mere gift to the employees. Indeed, as a matter of law, it seems clear that the payments must be treated as compensation for services rendered. Since the amount was measured by the earnings of the employees, and was treated by the payor as compensation, it would be required that the sums so paid be treated as wage payments. *Willkie v. Commissioner* (C.C.A. 6, 1942), 127 F. (2d) 953.

These payments of extra compensation were not granted as vacation payments, or as payments in lieu of vacation. The payments were made to employees who did not take vacations, and the payments did not coincide with the time of vacations (R. 814, and see Exhibits 6A, 85, 2B (R. 1300, original exhibits transmitted to this Court)). The most that can be said is that some employees considered that the payment of this extra compensation in the summer could be used to defray the expenses of a vacation. During the period involved, three payments of extra compensation were made. One of them was made during the summer and two of them were made at the year's end. Therefore, as to two-thirds of the amount of extra compensation received by each of the petitioners, there can be no suggestion that it was intended as vacation pay.

2. REASONS FOR ALLOWING THE SET-OFF

Under these facts there is presented a clear and narrow issue—whether or not all extra compensation paid by an employer to his employee, over and above the employee's regular rate, will be taken into consideration in determining whether or not the employer has paid that employee, over and above his regular rate, "not less than one and one-half times the regular rate" extra compensation for overtime as required by the Fair Labor Standards Act. In terms of this case, the question is whether or not an employee may establish a claim for extra compensation under the statute despite the fact that the employee has already received more extra compensation than he was entitled to under the statute.

As a matter of principle, the issue seems clear. A purpose of the Fair Labor Standards Act is to improve

the economic position of the working man by requiring payment of extra compensation if he works overtime. The statute places no limit on the maximum amount of such extra compensation. If an employer chooses to pay extra compensation in sums greater than the total obtained by multiplying the overtime hours by 150% of the employee's regular rate of pay, the employer is free to do so. As said in *Walling v. Belo Corp.* (1942) 316 U.S. 624, 632, the only requirement of the Act is that the overtime rate be not less than 150% of the basic rate "but the Act does not prohibit paying more."

The petitioners here claim (in accordance with the findings of the District Court) extra compensation. We say that the Company has already paid them extra compensation in sums greater than those which they claim and that, therefore, nothing more is due. It should not be said that because an employer has paid more than the law requires him to do, the employee may go back (keeping, of course, what he has already received) and compel the employer to pay a second time, computing the amounts exactly in accordance with the statutory formula.

If it had been specified by the employer, at the time these extra payments were made, that they were to be applied on any claims for unpaid wages or overtime compensation, there can be no question but that such application would be mandatory. Of course (and this possibility apparently occurred to the Master, R. 188), if the employer had any idea that the employees were secretly building up a claim that odd minutes spent in the plant before or after work should be paid for as hours worked, the employer would either have withheld the payment or stipulated in writing that it should be applied in satisfaction of any such claim.

It does not comport with American standards of justice to say that because the employer failed to exact such a stipulation at the time the extra compensation was paid, a group of employees who accepted the extra compensation may now compel the employer to pay still further extra compensation, especially where the employees' later claim is based upon the alleged inaccuracy of a time-keeping system which with full understanding of all the parties had been followed without objection over a period of many years. In such a case as this, there is room for application of the common law doctrines of estoppel.

3. THE PROPRIETY OF SUCH SET-OFF HAS BEEN JUDICIALLY RECOGNIZED

Precisely the same issue as that here involved was before the Court in *Corey v. Detroit Steel Corp.* (D.C. Mich. 1943), 52 F. Supp. 138, decided by another judge of the same District Court. In that case the Court found that the plaintiff employee had worked 1,102½ overtime hours for which he should have been paid time and a half, and that the difference between time and a half due for this overtime work and the straight time which had been paid to plaintiff amounted to $689.06. The Court further found that during this same period the employer had paid to plaintiff the sum of $400 as extra compensation under the term "bonus." The Court held that this $400 must be deducted from the amount due as extra compensation for overtime, leaving a balance of $289.06. To this there was added an equal amount as liquidated damages, the Court concluding that in calculating the amount due plaintiff, all of the payments received by him, including the bonus, should be taken into consideration, and that deduction of the amounts already paid must be made be-

fore any calculation of the statutory "additional equal amount as liquidated damages."

In reaching this conclusion, Judge Lederle cited and relied on *Bumpus v. Continental Baking Company* (C.C.A. 6, 1941), 124 F. (2d) 549. In that case the Court faced the question as to what effect should be given to the fact that certain extra compensation had been paid plaintiff over his regular rate, but in sums less than required by the Fair Labor Standards Act. The employee in that case had received extra compensation equal to one-third of his regular rate for hours in excess of forty-eight. It thus bore no relationship to the statutory requirement of time and one-half for all hours in excess of forty. Nevertheless, the Court held that all such amounts so paid plaintiff must be deducted in determining the amount due. The Court further held that such deduction must be made before calculation of the statutory "additional equal amount as liquidated damages."

In at least two other cases arising under the Wage and Hour law the courts have reached a similar result. In *Owens v. Gifford-Hill Pipe Co.* (D.C. Tex. 1941), 4 Lab. Cas. par. 60,735, 4 W.H. Rep. 697, in denying recovery in an employee's suit under the Fair Labor Standards Act, the Court pointed out that plaintiff's testimony as to wages received failed to take into account benefits he received, such as loans, electricity, the use of a parking lot for his trailer, etc. Similarly, in *Moore v. Perkins Dry Goods Co.* (D.C. Tex. 1942), 5 W.H. Rep. 168, 5 Lab. Cas. par. 60,940, the Court in denying recovery in such an action declared:

> "It does not occur to him that he received from the defendant $100 when he did not work at all, while he was sick, and other sums for holidays when he did not work at all, and things of that sort."

In other types of cases the same conclusion has been reached. See *Johnson v. Fuller & Johnson Mfg. Co.*, 183 Wis. 68, 197 N.W. 241 (1924), and *Keysaw v. Dotterweich Brewing Co.* (App. Div. N.Y. 1907), 121 App. Div. 58, 105 N.Y. Supp. 562.

It should be borne in mind that we have here not a case of evasion of the law. At most, the result of the case in the District Court was that the Company was found to be technically in error by a matter of a few minutes a day in making a precise computation as to the amount of time worked by each individual—and the Circuit Court of Appeals found that the Company was not in error at all. The Company used methods which are usual and are admittedly proper in plants where employees are paid a salary or hourly rate on the basis of hours worked, but the District Court concluded that this ordinary method could not properly be used in a shop where employees are paid piece rates. Yet the Company had been using this customary method, in good faith, for a long period of time. It had been going along for many years employing 1,000 or 1,200 persons in a comparatively small city, and no question had been raised by any of the employees as to the correctness of the Company's method of computing hours of work, although they well understood the method, and although they felt free to make objections (R. 190).

What is the fair thing to do? Is it not just and equitable—and certainly in accordance with the statute—to take the whole deal, and say to each individual employee that even if he should have been paid some $4 or $5 additional compensation over the wages and overtime which he had received, yet he has not been harmed because he has already received some $50 over and above the amount due him? As suggested by the District Court during the oral arguments (R. 1509), there can be no doubt but that

if the employer had suspected that any such a claim for overtime compensation would be made, it would have protected itself by providing, in making these payments of extra compensation, that such payments should be received in satisfaction of any claim an employee might have for overtime. As was conceded by the District Court on the oral argument (R. 1509) there would be no question as to the effectiveness of such stipulation and agreement.

We submit that every argument of fairness and equity, as well as purely logical arguments based upon the language of the Act, require such set off.

4. DECISION OF DISTRICT COURT

In a Supplemental Opinion filed March 3, 1944 (R. 287), the District Court stated that it was the position of respondent that these payments "whether they be called bonuses, gifts, gratuities or extra compensation, can now be deducted by it from the amounts" [allowed under Court's formula] "in determining the amount of the judgment to be entered in favor of each individual" (R. 289). This, however, was not our claim. The position was, rather, that the payments in question were payments of extra compensation, not gifts (R. 267). We think this position was made clear. In the hearing held on this question on January 4, 1944 (R. 1510), the District Court agreed that "all the evidence shows that it is extra compensation."

The District Court's supplemental opinion (R. 287) then cited the decision in *Corey v. Detroit Steel Corp.* (D.C. Mich. 1943), 52 F. Supp. 138, and said that the decision in the *Corey* case was easily distinguishable be-

cause in the instant case the payments in question were a bonus or gratuity given voluntarily and without compulsion (R. 290). This, of course, was likewise true in the *Corey* case. There is no distinction. The *Corey* case is unquestionably on "all fours" with the instant case (R. 1512). The District Court then says that since these payments were intended as a gift or gratuity, it would savor too largely of "Indian giving" to permit the amounts of these payments to be set off against the recovery allowed, as was done in the *Corey* case (R. 291). But this suggestion by the District Court that the amounts so paid were intended as a gift or gratuity is quite contrary to all the testimony in the case.

G. REPLY TO BRIEF OF APPELLANTS (PETITIONERS)

It was necessary for respondent to place its brief in the hands of the printers before receiving the brief of petitioners, in order that respondent's brief could be filed with the Court before the case (which is on the call for the week of January 7, 1946) is reached for oral argument. Subsequently, we received a copy of petitioners' brief. It being too late to have our brief re-printed, we are appending thereto at this point such additional statement as appears to be required with reference to petitioners' brief.

Petitioners' brief does not contain any complete, consecutive, or comprehensive statement of facts. Throughout petitioners' brief, however, there are found various argumentative statements concerning various aspects of the case. We feel compelled to point out to the Court

that petitioners' brief is replete with statements which are not supported by the record. Many of them are in fact contradicted by the record. We comment, *infra*, on some of these instances but space limitations preclude answering all of them. We must respectfully ask the Court, as to the numerous statements made in petitioners' brief without reference to the record, not to accept such statements unless support therefor can be found in the record. In many instances no such support can be found. As to statements asserted on the basis of references to the record or transcript, we must respectfully ask the Court to check such references carefully since in many instances they do not support the statements as made.

A large portion of petitioners' brief is devoted to the argument of the following three points: First, that petitioners should have been given a judgment computed on the basis that employees must be paid for all time elapsing from the moment they punch the time clock on entering the factory until the moment they again punch the time clock on leaving the factory; secondly, that employees should have been given a judgment for the cost of certain tools which they paid for and which were used by them in performing their work; third, that judgment should have been entered in favor of substantially all employees of respondent, including hundreds of employees or former employees who were not parties to the action.

As to all these three points the judgment of the District Court was against the petitioners and in favor of respondent company (indeed, the third point was not even argued in the District Court). The petitioners (plaintiffs in the District Court) did not file any appeal or cross appeal to the Circuit Court of Appeals and, consequently, these points were not presented to the Circuit Court of

Appeals and, we submit, are not before this Court. In this connection, may we refer to our argument at p. 72, *supra*.

I. Reply to Petitioners' Statement of Questions Involved

We submit that the questions before the Court on this appeal are those stated by us at p. 6, *supra*, and that petitioners' brief does not correctly set forth the questions here involved.

The question is not (as petitioners state in I—petitioners' brief, p. 1) whether employees are entitled to compensation for time spent performing production work, but whether any employees performed any work for which they were not compensated.

Petitioners' statement of the second question said to be involved (petitioner's brief—p. 3) suggests that the judgment of the District Court was based on the proposition that the employees should be paid for a certain portion of the time spent walking from the time clock to the job. They assert that the question is whether the District Court may "adopt a reasonable formula by which employees may be reimbursed for certain travel time spent upon employer's premises, at employer's request." This question, likewise, is not involved. The District Court did not undertake to reimburse employees for travel time on the employer's premises. Instead, as we have pointed out *supra*, pp. 4, 5, 19, et seq., the District Court held that time spent by the employees in punching the time clock, walking to their places of work, and there perhaps waiting for their fellow workers to arrive, should not be counted as hours of work.

Petitioner's question III (p. 3—petitioner's brief) complains of the refusal of the District Court to compel the

employer to pay for certain tools used by the employees. The District Court held that the employer should not be required to do this and the employees did not appeal from this adverse holding of the District Court. We submit the question is therefore not involved.

Petitioners' question IV (petitioners' brief—p. 4) is a restatement of the third question as stated by respondent at p. 7 *supra*. In restating it, the petitioners suggest that the real question is whether the employer may offset against claims for overtime compensation "gratuities" given employees "several years before." This, of course, assumes that the payments in question were gratuities rather than payments of extra compensation. We have pointed out *supra*, pp. 135, 141, that this assumption is incorrect. The suggestion that the payments of extra compensation had been given "several years before" is misleading. The payments in question were made at the same time and for the same period with respect to which the claims of the employees are asserted.

Petitioner' question V (petitioners' brief—p. 4) complains of the order of the District Court (R. 29, 32) requiring the designation of plaintiffs and limiting the action to such individuals as appropriately indicated their desire to be included as parties to the action. This question again is not involved because the employees did not at any time appeal from this ruling.

It may be noted, however, that the order of the District Court in this respect represented the common practice in these suits. Similar procedures have been adopted in many cases.

Abram v. San Joaquin Cotton Oil Co. (D.C. Cal. 1942), 46 F. Supp. 969;

Lofther v. First National Bank (D.C. Ill. 1941), 45 F. Supp. 986;

Archer v. Cornillaud, (D.C. Ky. 1941), 41 F. Supp. 435;

Gordon v. Paducah Ice Mfg. Co., (D.C. Ky. 1941), 41 F. Supp. 980;

Shain v. Armour & Co., (D.C. Ky. 1941) 40 F. Supp. 488;

Fellabaum v. Swift & Co., (D.C. Ohio) 7 Lab. Cas., par. 61,868;

Wilson v. F. J. Egner & Sons, Inc. (D.C. Ohio), 8 Lab. Cas., par. 62, 178;

Dolan v. Day & Zimmerman, Inc. (D.C. Mass), 8 Lab. Cas., par. 62,189.

Petitioners' question VI (petitioners' brief—p. 5) raises the point as to whether pieceworkers are entitled to overtime pay under the Fair Labor Standards Act; but this question is not involved for respondent agrees that the Fair Labor Standards Act does apply to pieceworkers.

Petitioners' question VII (petitioners' brief—p. 5) is apparently intended to furnish a foundation for an argument that a District Court may refuse to accept the findings of fact by a Special Master even though such findings are supported by the great preponderance of the testimony and are not shown to be clearly erroneous, and that the District Court's refusal to accept such findings may not be challenged unless it appears that the District Court acted in bad faith or that its action constituted an abuse of discretion. But this argument cannot be advanced so long as Rule 53 (e)(2), Federal Rules of Civil Procedure, remains in effect.

II. Reply to Petitioners' Statement of Facts

1. REPLY TO PETITIONERS' GENERAL STATEMENT (pp. 6-10, Petitioners' Brief)

This section of petitioners' brief seeks to create an impression that there was evidence tending to prove that all the employees started work immediately after punching the time clock and continued at work until punching out, thus contributing "as much as 16 minutes a day" of uncompensated labor. But there is no evidence to support any such conclusion, and none is cited. The brief asserts (p. 8) that the employees "went directly from the time clock to their departmental assignments." This must be taken as meaning that they went to their departments and started work, but there was no proof of this. As pointed out in the Master's report (R. 180), some of the employees did not state when they started work after arriving in their departments. Those who did testify on direct examination that after punching the time clock they went to their departments and started work admitted on cross-examination that they could not say just when they started work, and that the time of starting work would vary from day to day, and that on some days work would start after the starting time. The evidence as to the time of starting work in various departments is reviewed in full *supra*, pp. 42-61).

The allegation (p. 7, petitioners' brief) that the action sought recovery of the statutory minimum wage of 30¢ an hour should perhaps be mentioned. While it is true that the complaint (R. 9) recited that some employees earned less than 30¢ an hour, yet there were no proofs offered in support of any such claim, nor was any such claim included in the pre-trial statements of the issues on which the case was tried. (See p. 12, *supra*).

It should not be understood from the assertions on p. 8 of petitioners' brief that the time spent by dippers in stirring the glaze is a part of the activities which were referred to by the courts below as "preliminary activities." Stirring the glaze was a part of the dipper's job and was counted by the Company as actual production work (R. 1178).

As to the assertion that the entire department could punch through the time clock in a minute or a minute and a half, we refer to p. 34, *supra*.

Petitioners argue (p. 9) that since the employees were on a group piece work job "each employee saw to it that his co-workers in the undertaking rushed into productive labors without delay." There is no evidence to support this statement and none is cited. This falls within the category of things which petitioners announced they would prove but did not (see comments of District Judge, R. 1506).

Petitioners then assert (p. 9) that "the procedure of the named plaintiffs was followed by other employees." The record reference does not support this conclusion. Rather, the fact is, as we have pointed out, p. 105 *supra*, there is no evidence as to any of the employees who did not testify ever having started work early.

Petitioners' brief (p. 9) refers generally to a requirement that employees punch the time clock "as much as fourteen minutes before the regular starting time," and to an alleged repetition of the "process" at noon and at the end of the day, with the implication that employees worked 14 minutes longer than they were paid for on four occasions per day "so that in many instances this amounts to as much as 56 minutes a day, that is, as much as fourteen minutes time was 'contributed' by employees four

times a day." All this is sought to be supported by a reference to R. 414, the testimony of petitioner Anderson. This reference in no way supports the assertions. As pointed out *supra*, p. 40, it was in fact clearly established on the record that employees were not required to, and normally did not, punch in 14 minutes before starting time. This is referred to in the report of the Master (R. 177, 180, 185) and the opinion of the District Court (R. 243). It was established beyond doubt that employees did not continue work after the regular quitting time but rather quit work early. This is pointed out in the Master's report (R. 182) and is referred to in the opinion of the District Court (R. 244). Neither was there any testimony (as pointed out *supra*, p. 108), as to employees starting work early on returning to the plant after the lunch period.

We do not attempt to refer to all the instances where in our opinion petitioners' brief incorrectly states the facts. We could refer to many others—e.g., the reference (p. 10) to objections by employees (as the Master pointed out (R. 190)—the fact is that none of the employees objected), or the reference (p. 10) to "strikes over the matter" (the testimony being that in the course of the two strikes referred to, no demands at all were made with reference to this matter—R. 1299).

2. REPLY TO PETITIONERS' STATEMENT AS TO WAGE AND HOUR DIVISION (pp. 11-13, Petitioners' Brief)

It is not a fact, as suggested at pages 12-13 of petitioners' brief, that the Wage and Hour Division of the United States Department of Labor found that the respondent company had incorrectly computed the hours of work of employees. The brief incorrectly treats Exhibit

91 as representing a determination by a representative of that government agency. That exhibit (R. 1323, reproduced at R. 1547) is a letter which was written subsequent to the period involved in the suit. It does not purport to represent the conclusions or findings of the author as to respondent's practices. As is evident from an examination of this letter, it refers not to any investigation or finding by the Wage and Hour Division but only to "information received" at the offices of the Wage and Hour Division—received doubtless from the employees and their counsel.

The fact is that the Wage and Hour Division had inspected the plant of the respondent company in 1939. That was the only inspection made during the period involved. The results of that inspection are disclosed in Exhibits 29 and 81 (R. 600, 1159, 1165—original exhibits transmitted to this Court) and the testimony of Mr. Doll (R. 1156-1160). The only finding of the Wage and Hour Division was that during the first year of operations under the statute, respondent company had committed one technical error in computing overtime on a bi-weekly basis rather than on a weekly basis. This error had been cured in 1939, nearly two years before the suit was filed, and was not involved in the suit.

A reading of petitioner's brief might give an incorrect impression as to the testimony of witness Reifin who had been an employee of the Wage and Hour Division. He was called as a rebuttal witness. He did not, however, deny that during the inspection, which he had assisted in making in 1939, he had complimented the company on the completeness with which its records were kept (R. 1157) and had advised that the employees had no complaint to make (R. 1216). Nor did he testify that he had made any finding that petitioners worked for longer peri-

ods than they were paid for. As pointed out by the Master (R. 158) "a careful study of Mr. Reifin's testimony indicates that he nowhere states he told the company it was working its employees before and after the established shift periods for which they were credited."

3. REPLY TO PETITIONERS' ARGUMENT THAT RESPONDENT COMPANY ORDERED EMPLOYEES TO REPORT FOR WORK AT A PARTICULAR TIME (pp. 14-16, Petitioners' Brief)

It is charged on p. 14 of petitioners' brief that those employees who did not report on the job before the regular starting time were sent home or given time off. Reference is made to the testimony of Anderson and Mrs. Socia. Petitioners, however, fail to point out that the testimony of Anderson on this point was found by the Master to be unworthy of belief (R. 182) and that the testimony of Mrs. Socia was likewise discredited (R. 181). Petitioners likewise fail to point out that the District Court declared in its opinion that "there is no evidence, as contended for by plaintiffs, that if the employee didn't get there at 14 minutes to seven, he was fired" (R. 243). As pointed out by the Master (R. 177) the time clock cards showed no consistent pattern of early punch-ins.

The assertion (p. 14) that the District Court found that respondent company ordered its employees to do work before the regular starting time for which the employees received no wages, is not supported by any record references and is in fact entirely unfounded.

We must likewise point out the error of the assertion (p. 14) that the foremen "admitted the facts to be as outlined by the appellant-employees." We have discussed in detail the testimony of the foremen on this point, *supra*, pp. 114, 115.

4. REPLY TO PETITIONERS' DISCUSSION OF COMPUTATION OF WAGES (pp. 16-20 Petitioners' Brief)

This section of petitioners' brief is devoted principally to an argument concerning what are called "wage deductions." The complaint is that the Company required certain classes of employees to furnish some of their own tools, just as a bricklayer furnishes his trowel. The facts as to this matter are set forth in the Master's report (R. 203 et seq.) and briefly summarized in the opinion of the District Court (R. 244 et seq.). We respectfully refer the Court to these findings for a correction of the assertions made in petitioners' brief.

The decision of the District Court was to the effect that nothing in the Fair Labor Standards Act required the employer to furnish tools to his employees; and these claims of the employees were denied. The employees (petitioners herein) did not appeal from this adverse decision of the District Court and, we submit, the issue cannot be raised here. However, in view of the assertions made in petitioners' brief in this connection, we should like to point out the position of the Company at the trial that in fact there were no deductions from wages (R. 1132, 1138); that the deductions were not deductions from wages at all but just one of the factors involved in their determination, the cost of any tools purchased by the employee being taken into consideration in fixing the piece rates, and the employee's gross wages being the amount left after such deductions had been made. (See report of Master, R. 205 and R. 1138). It should perhaps be also noted that the regulations of the Wage and Hour Division recognize the propriety under the statute of making deductions from an employee's wages for tools purchased by that employee from the employer unless the effect of such deductions is to reduce the wages of the em-

ployee below the statutory minimum wage (1944-45 Wage Hour Manual, p. 259; 6 W. H. Rep. 33), and there is no such claim here. It should also be pointed out that the decision in *Walling v. Peavey-Wilson Lumber Company* (D.C. La. 1943), 49 F. Supp. 846, relates to a case involving deductions that brought the employee's cash wages below the statutory minimum.

Without attempting to answer this section of the brief in detail we think we should perhaps reply to the charge made at p. 17 that the Company admitted making up to 33-1/3% profit in marking up the articles which it bought and sold the employees. The testimony is that the Company's operations in selling tools to employees who desired to buy their tools from the Company were conducted at a loss (R. 1287).

5. REPLY TO PETITIONERS' ARGUMENT THAT THERE IS CONCLUSIVE EVIDENCE AS TO HOURS WORKED (pp. 20-22, Petitioners' Brief)

At p. 20 of petitioner's brief it is asserted that "the plaintiff employees all testified that they and the other employees observed by them, all began production work immediately after checking through the time clocks." This charge again is quite unsupported by the record references cited. An accurate summary as to the testimony on this point is found in the report of the Master (R. 175), who pointed out "the employee witnesses did not testify generally as to the time production started."

The argument of this section of petitioners' brief is that the time clock cards showing the time the employees entered and left the plant must be accepted as showing their hours of work—that an employee must be conclusively presumed to be at work the moment he enters the plant and rings the time clock. This argument we have covered *supra*, pp. 73-99.

As to the summary on p. 21 of petitioners' brief we reply (1) the employer ordered the employees to be ready for work at the regular starting time—not before; (2) the employees did not show that after punching the time clocks they immediately went into productive work; (3) the ring-ins and ring-outs on the time clock cards do not show the hours and minutes worked by the employees. Both of the lower courts so found.

III. Reply to Petitioners' Argument

1. AS TO ARGUMENT THAT WORKING TIME BEGINS WITH CHECKING IN AND ENDS WITH CHECKING OUT (p. 23-28, Petitioners' Brief)

Again we must point out that assertions of fact are made without reference to the record which in fact cannot be supported by the record. For example, on p. 23 it is asserted that the only records kept by the employer were the time clock cards. The fact is, as we have pointed out *supra*, pp. 31 *et seq.*, the time clock cards were used primarily as attendance records only. The company kept permanent records of the hours worked each day by the employees and a copy of the company's computations as to the hours worked was subsequently written on the right-hand margin of the time clock cards for the information and convenience of the employees. Similarly, the allegation that the employees here involved prepared themselves for their productive tasks before checking through the time clocks is quite incorrect. The testimony is to the opposite effect. See pp. 45-59, *supra*.

It is charged on p. 28 that the District Court specifically found that the respondent company "required its employees to report for work at 14 minutes to 7:00 o'clock in the morning, starting them practically imme-

diately, and yet computed their hours from 7:00 o'clock continuing this practice throughout the day so that, in fact, the employees worked as much as approximately 56 minutes every day, which time was never computed in determining overtime." Petitioners refer to R. 240. Reference indicates that the Court was stating this as the claim of the plaintiffs, but the Court found that this claim was not proved. On the contrary, it was found that employees were not required to and normally did not punch in 14 minutes before starting time and did not work after quitting time (R. 177, 182, 243, 244). In other words, the finding of the District Court was precisely the opposite of what petitioners assert the finding to have been.

The argument at p. 28 that the vast majority of the employees had checked through the time clocks more than 10 minutes before starting time and that by 8 minutes to the hour only a few stragglers were left, has been discussed *supra* pp. 109-113.

The Circuit Court of Appeals and the District Court both accepted the factual findings of the Master that on these facts working time could not be computed as extending from the time of ringing in to the time of ringing out. This we have discussed *supra* pp. 15-22.

The various arguments demonstrating the correctness of this factual holding (on which all the Courts agreed) we likewise have discussed *supra*, pp. 81-99.

We have also pointed out (*supra*, p. 71) that this point is not properly before the Court.

As to the argument based on the decisions of this Court in *Tennessee Coal, Iron & Railroad Company, et al. v. Muscoda Local* 123 et al., 321 U.S. 590 and in *Jewell Ridge Coal Corporation v. Local No. 6167, et al.*, 325 U.S. 161, we think we need add nothing to our discussion at pp. 73-80, *supra*.

The cases cited in the footnote on page 26 of petitioners' brief are not helpful under the factual situation shown to exist here. One of the cases referred to is *Ballard v. Consolidated Steel Co.*, (D.C. Cal. 1945), 61 F. *Supp.* 996. That case involved a question as to the working hours of certain guards and firemen. In its opinion the District Court (at p. 1005) specifically referred to the decision of the Circuit Court of Appeals in the instant case and pointed out that its decision was not in conflict with the decision of the Circuit Court of Appeals herein. Another case referred to, *Ulle v. Diamond Alkali Company* (D.C. Ohio, 1945), 8 W. H. Rep. 1043 (not officially reported) was a consent judgment entered pursuant to a stipulation of the parties. The decision in *Edmondson v. Yellow Truck & Coach Company* (D.C. Mich. 1945), 8 W. H. Rep. 187 (not officially reported) involved payment to plant protection men for time spent attending roll call, standing inspection, receiving instructions, etc. *Alberts, et al. v. Porter, et al.* (D.C. Ill. 1945), 10 Lab. Cas. par. 62,809 (not officially reported) was a similar case. In *Walling v. Frank* (D.C. Ky. 1945), 62 F. Supp. 261, it appeared that the employees were required to oil and clean machinery and to sort and assemble certain tickets outside of the regular hours of work. The Court held that the time spent in these activities should be deemed to be a part of the hours of work. Similarly, in *Walling v. Blue Mt. Logging Company, Inc.*, (D.C. Wash. 1942), 6 Lab. Cas. par. 61,466, it was held that time spent by employees oiling, adjusting and warming up their engines as well as certain waiting time of truck drivers should be included in computing hours worked. None of these cases bear any resemblance to the factual situation here involved.

Petitioners cite *Sunshine Mining Company v. Carver* (D.C. Idaho 1941), 41 F. Supp. 60, as holding that em-

ployees must be paid for the time spent in going from the time clock to the work benches. What this case in fact held was that working time of miners included time spent in descending from the portal of the mine, going down the shaft to the usual place of work, and time spent at the end of the day returning up the shaft. The Court ruled against the contention of the employees that they should be deemed to be at work during the period in which they were engaged on the company's premises in changing their clothes, picking up tools, preparing themselves for work, etc.[3]

2. REPLY TO ARGUMENT AS TO THE EFFECT OF THE DECISION OF THE CIRCUIT COURT OF APPEALS (pp. 29-31, Petitioners' Brief)

We respectfully point out that counsel for petitioners are in error in stating that the Circuit Court of Appeals treated this case as an ordinary travel time case and completely misconstrued the District Court's decision (peti-

[3] That case was before the Court on a petition of the employer for a declaratory judgment. Paragraph 13 of the third amended complaint filed in the action recited in part that the employees complained that all time spent by an employee from the time he left the "dry" or change house until he returned to the "dry" were hours of employment. This is to be understood in light of the Court's finding of fact No. 15 that before reporting for work in the morning many of the employees changed to their working clothes at a building called the "dry," and some who so desired picked up electric lamps or obtained carbide for their carbide lamps, etc. The claim of the employees that the time so spent in making preparations for work should be included as a part of their hours of work was answered by the Court's third conclusion of law that the hours of work began after the completion of such preparatory activities and at the time the employees arrived at the collar or portal of the mine where they were required to report at a specified time.

tioners' brief, p. 30). We suggest that the opinion of the Circuit Court of Appeals is the best answer to this argument. The assertion is made (p. 29) that the Circuit Court held that "an employer could require its employees to report on the premises and undertake productive labors at any time, disregarding time clock cards entirely—and then pay said employees only for an arbitrary 'starting time,' which begins a considerable time after actual productive labors are undertaken." This is an obvious misstatement of the opinion and holding of the Circuit Court of Appeals.

We have discussed in detail, *supra* (pp. 18-22), the holdings of the District Court and the Circuit Court of Appeals as to what constituted working time, pointing out that the lower courts have been in agreement on this factual question and that it is not here involved.

The argument on p. 30 appears to be that the District Court had power to adopt an arbitrary formula. Petitioners refer to the suggestion of this Court in the *Tennessee Coal & Iron Company* case to the effect that the decision therein did not foreclose reasonable provisions of contract to govern the computation of work hours where precisely accurate computation is difficult or impossible. Assuming that an agreement may validly be made as to computation of working hours where precise computation is impossible, it does not follow that the judgment of the District Court may be affirmed. In this case there was a custom and agreement (as we have pointed out *supra*, pp. 31, 97) that hours of work should be computed in the method which the company had followed for many years, and which was sustained as accurate by the Circuit Court of Appeals. We submit that there is nothing in the prior decisions of this Court

which would authorize the District Courts, as petitioners would have them do, to write or re-write a contract for the parties to govern the computation of working hours.

3. REPLY TO ARGUMENT THAT PIECE WORKERS ARE COVERED BY THE FAIR LABOR STANDARDS ACT (pp. 32-34, Petitioners' Brief)

The respondent company, of course, has always taken the position that its employees engaged at piece rates should be paid overtime for any work week in which they worked more than the maximum straight-time hours; and the company has paid overtime to its employees who worked more than 40 hours a week. We have discussed this *supra*, p. 41.

H. CONCLUSION

The cause was fully tried, some twenty-three trial days having been devoted to an exhaustive inquiry which developed all the available facts that could be shown by either petitioners or respondent. It has been clearly demonstrated that the employees of respondent Company did not start production ahead of starting time; and it is equally clear that they cannot establish how much time they may have spent (after entering the plant and before starting production) in various preliminary activities preparatory to going to work; nor can they establish whether the time so spent came before or after the regular starting time. Furthermore, the record discloses no basis for setting aside the factual findings of the courts below, which found that under the particular circumstances here involved, working time did not include all the time spent by the employees in the plant, as reflected

by the time clock cards. These factual findings were in accordance with the general principles laid down in prior decisions of this Court, and in accordance with the commonly understood and generally accepted meaning of the statutory terms.

The concurrence of the lower courts in this finding of fact, and the demonstrated inaccuracy of the conjectural formula which was made an arbitrary basis of judgment in the District Court, and the settled requirements as to the respect which must be accorded the report of the Special Master, all make it clear that the judgment of the Circuit Court of Appeals should be affirmed, and the petitioners' action dismissed.

Respectfully submitted,

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APPENDIX

1. Fair Labor Standards Act

The relevant provisions of the Fair Labor Standards Act (Act of June 25, 1938, 52 Stat. 1060, 29 U.S.C.A. Sec. 201-219) are as follows:

Sec. 6 (a) "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title."

(29 U.S.C.A. Sec. 206)

Sec. 7. (a) "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section.

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

(29 U.S.C.A. Sec. 207)

Sec. 16 (b) "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

(29 U.S.C.A. Sec. 216)

2. Walsh-Healey Public Contracts Act

The relevant provisions of the Walsh-Healey Public Contracts Act (Act of June 30, 1936, as amended, 49 Stat. 2036, 41 U.S.C.A. Secs. 35-46) are as follows:

> Sec. 1. "That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States) for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount, exceeding $10,000, there shall be included the following representations and stipulations:
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> • • •
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> (c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week: Provided, That the provisions of this sub-section shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs 1 and 2 of subsection (b) of Section 7 of an Act entitled 'Fair Labor Standards Act of 1938'."
>
> (41 U.S.C.A. Sec. 35)

By regulations promulgated under this Act, it is provided:

> "Employees engaged in or connected with the manufacture, fabrication, assembling, handling,

supervision, or shipment of materials, supplies, articles, or equipment used in the performance of the contract may be employed in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, provided such persons shall be paid for any hours in excess of such limits the overtime rate of pay which has been set therefor by the Secretary of Labor.

"Until otherwise set by the Secretary of Labor the rate of pay for such overtime shall be one and one-half times the basic hourly rate or piece rate received by the employee."

(Article 103, Regulations prescribed by the Secretary of Labor under the Public Contracts Act.)

3. Federal Rules of Civil Procedure

The relevant provisions of Rule 52 (a) Federal Rules of Civil Procedure are as follows:

"In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

The relevant provisions of Rule 53 (e) (2), Federal Rules of Civil Procedure, are as follows:

"In an action to be tried without a jury the Court shall accept the Master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report

any party may serve written objections thereto upon the other parties. Application to the Court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The Court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

(28 U.S.C.A., following Sec. 723 (c))